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1175

THE GIFT OF

Prof. Charles K. Adams

Patton R. S. January 10th A.D. 1805

THE

WORKS

OF

THE HONOURABLE

JAMES WILSON, L. L. D.

LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA.

PUBLISHED UNDER THE DIRECTION

OF

BIRD WILSON, ESQUIRE.

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CIC.

VOL. I.

PHILADELPHIA:

AT THE LORENZO PRESS, PRINTED FOR BRONSON AND CHAUNCEY.

1804.

DISTRICT OF PENNSYLVANIA:—TO WIT.

(L. S.) BE IT REMEMBERED, That on the fifth day of July, in the twenty ninth year of the independence of the United States of America, BIRD WILSON, Esquire, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"The Works of the Honourable James Wilson, L. L. D. late one of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia. Published under the direction of Bird Wilson, Esquire. Lex fundamentum est libertatis, qua fruimur. Legum omnes servi sumus, ut liberi esse possimus."—Cic.

In conformity to the act of the Congress of the United States entitled "An act for the encouragement of learning by securing the copies of maps, charts and books to the authors and proprietors of such copies during the times therein mentioned; and also to the act entitled "An act supplementary to an act entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL, Clerk of the
District of Pennsylvania.

PREFACE.

THE incomplete state of the lectures on law, notwithstanding the lapse of several years between the time at which those now published were delivered and the death of the Author, is a circumstance of which the publick will naturally inquire the cause. The circumstance itself is certainly much to be lamented; but its cause presents a subject of still deeper regret.

The law professorship, in the college of Philadelphia, was established in the year 1790; and the Author was appointed the first professor. The extent of his plan of lectures rendered it impossible for him to go through his whole subject in one season: three courses were necessary for the purpose. The first course, which was delivered in the winter of 1790-91, consisted of those lectures contained in what the Editor has entitled the *first part*. The second course, which was, in a great measure, delivered in the following winter, would have consisted of the remaining two parts now published. In April, 1792,

the college of Philadelphia and the university of Pennsylvania were, by an act of assembly, united into one seminary, under the latter title. A law professorship was erected in the new seminary, and the Author again appointed to fill the chair; but no lectures were delivered after the union. The preceding course had been interrupted and was not completed. The causes of these circumstances are not within the Editor's knowledge. He knows, however, that, though the delivery of the lectures was discontinued, the Author designed to complete his plan for publication. From this design his attention was drawn by another object of more importance, in which he was engaged.

In March, 1791, the house of representatives in the general assembly of Pennsylvania, resolved to appoint a person to revise and digest the laws of the commonwealth; to ascertain and determine how far any British statutes extended to it; and to prepare bills, containing such alterations, additions, and improvements as the code of laws, and the principles and forms of the constitution then lately adopted might require. The Author was unanimously appointed for that purpose. The nature of the plan which he formed in consequence of this resolution, will appear from the following letter on the subject, delivered to the speaker of the house of representatives on 24th August, 1791.

SIR,

WHILE I am employed in executing the trust committed to me by the house of representatives, it is, I conceive, my duty, from time to time, to inform them, through you, of the steps which I have taken, and of those which I mean to take, in order to accomplish the great end which is in contemplation.

From the records deposited in the rolls office, I have taken an account of all the laws made in Pennsylvania from its first settlement till the beginning of the last session of the legislature. They are in number one thousand seven hundred and two. Their titles I have entered into a book, in the order, usually chronological, in which they are recorded. On some of them, especially those of an early date, I have made and minuted remarks; and have left ample room for more, in the course of my further investigations. I have also reduced their several subjects into an alphabetical order, by entering them regularly in a common place book. This process required time, and care, and a degree of minute drudgery; but it was absolutely requisite to the correct execution of the design. How can I make a digest of the laws, without having all the laws upon each head in my view? This view can in the first instance be obtained only by ranging them in an exact common place.

But something more must still be done. To rank, in a correct edition, the several laws according to their seniority or to the order of the alphabet would, by no means, be correspondent to the enlarged plan signified by the resolutions of the house. It is obvious, and it was certainly expected, that, under each head, the different regulations, however dispersed, at present, among numerous laws, should, in the digest, be collected in a natural series, and reduced to a just form. This I deem an indispensable part of my business.

But the performance of this indispensable part gives rise to a new question. In what order should the methodised collections be arranged?

A chronological order would, from the nature of those collections, be impracticable: an alphabetical order would be unnatural and unsatisfactory. The order of legitimate system is the only one, which remains. This order, therefore, is necessarily brought into my contemplation. My contemplation of it has been attended with the just degree of diffidence and solicitude. To form the mass of our laws into a body compacted and well proportioned, is a task of no common magnitude. Arduous as it is, the enlarged views of the house of representatives stimulate me to attempt it. In such an attempt it will not be dishonourable—even to fail.

Of this system, I have begun to sketch the rough outlines. In finishing them, and in filling them up, I mean to avail myself of all the assistance, which can possibly be derived from every example set before me. But, at the same time, I mean to pay implicit deference to none.

The acts of the legislature of Pennsylvania, though very numerous, compose but a small proportion of her laws. The common law is a part, and, by far, the most important part of her system of jurisprudence. Statute regulations are intended only for those cases, comparatively few, in which the common law is defective, or to which it is inapplicable: to that law, those regulations are properly to be considered as a supplement. A knowledge of that law should, for this reason, precede, or, at least, accompany the study of those regulations.

"To know what the common law was before the making of any statute," says my Lord Coke, in his familiar but expressive manner, "is the very lock and key

to set open the windows of the statute."[a] "To lay the statute laws before one who knows nothing of the common law, amounts, frequently, to much the same thing as laying every third or fourth line of a deed before one who has never seen the residue of it. It would, therefore, be highly eligible, that, under each head of the statute law, the common law, relating to it, should be introduced and explained. This would be a useful commentary on the text of the statute law, and would, at the same time, form a body of the common law reduced into a just and regular system."

With such a commentary, the digest which I shall have the honour of reporting to the house will be accompanied. The constitution of the United States and that of Pennsylvania, compose the supreme law of the land: they contain and they suggest many of the fundamental principles of jurisprudence, and must have a governing and an extensive influence over almost every other part of our legal system. They should, therefore, be explained and understood in the clearest and most distinct manner, and they should be pursued through their numerous and important, though remote and widely ramified effects. Hence it is proper, that they also should be attended with a commentary. These commentaries will not, however, form a part of my report: they must stand or fall by their own merit or insignificance.

Another question, of very considerable importance, has occurred to me: the result of my reflections upon it, I beg leave to lay before the house.

[a] 3. Ins. 308.

In what manner should the digest of the laws of Pennsylvania be composed? Should it imitate the style of the British acts of parliament and those statutes, which have been framed upon their model—or should it be written in the usual forms of composition?

To professional gentlemen it is well known, that, in England, all bills were anciently drawn in the form of petitions; that these petitions, with the king's answer, were entered upon the parliament rolls; and that, at the end of each parliament, they were reduced into statutes by the judges. Hence the form, "may it please your majesty, that it may be enacted" and "be it enacted, &c." This form, like many others, has been continued in England long after the reason of it has ceased. This form, like many others, has been introduced into the colonies, and, among the rest, into Pennsylvania, where the reason of it never existed. Thus almost every sentence in our acts of assembly begins with a "be it enacted."

This form, though without foundation in Pennsylvania, is not, however, without its inconveniences. To introduce every sentence under the government of a verb, gives a stiffness—to introduce every sentence under the government of the same verb, gives a monotony as well as stiffness, to the composition. To avoid the frequent reiteration of those blemishes, the sentences are lengthened. By being lengthened, they are crowded with multifarious, sometimes with heterogeneous and disjointed, circumstances and materials. Hence the obscure, and confused, and embarrassed periods of a mile, with which the statute books are loaded and disgraced.

But simplicity and plainness and precision should mark the texture of a law. It claims the *obedience*— it should be level to the *understanding* of all.

By the first assembly of Pennsylvania an act was made "for teaching the laws in the schools."[b] This noble regulation is countenanced by the authority and example of the most enlightened nations and men. Cicero[c] informs us, that when he was a boy, the laws of the twelve tables were learned "ut necessarium carmen," as a piece of composition at once necessary and entertaining. The celebrated legislator of the Cretans used all the precautions, which human prudence could suggest, to inspire the youth with the greatest respect and attachment to the maxims and customs of the state. This was what Plato found most admirable in the laws of Minos.

If youth should be educated in the knowledge and love of the laws: it follows, that the laws should be proper objects of their attachment, and proper subjects of their study. Can this be said concerning a statute book drawn up in the usual style and form? Would any one select such a composition to form the taste of his son, or to inspire him with a relish for literary accomplishments? It has been remarked, with truth as well as wit, that one of the most irksome penalties, which could be inflicted by an act of parliament, would be, to compel the culprit to read the statutes at large from the beginning to the end.

But the knowledge of the laws, useful to youth, is incumbent on those of riper years.

[b] R. O. book. A. p. 22. [c] De leg. l. 2. c. 23.

From the manner, in which other law books, as well as statute laws, are usually written, it may be supposed that law is, in its nature, unsusceptible of the same simplicity and clearness as the other sciences. It is high time that law should be rescued from this injurious imputation. Like the other sciences, it should now enjoy the advantages of light, which have resulted from the resurrection of letters; for, like the other sciences, it has suffered extremely from the thick veil of mystery spread over it in the dark and scholastick ages.

Both the divinity and law of those times, says Sir William Blackstone,[d] were frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial. Law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new and oppressive refinements ingrafted upon feodal property: which refinements were, from time to time, gradually introduced by the Norman practitioners, with a view to supersede (as they did in a great measure) the more homely, but the more free and intelligible, maxims of distributive justice among the Saxons.

As were the divinity and the law, such likewise was the philosophy of the schools during many ages of darkness and barbarism. It was fruitful of words, but barren of works, and admirably contrived for drawing a veil over human ignorance, and putting a stop to the progress of knowledge.[e] But at last the light began to dawn. It has dawned, however, much slower upon the law,

[d] Bl. Com. 410. 2. Id. 58. [e] Reid. Ess. Int. 127.

than upon religion and philosophy. "The laws," says the celebrated Beccaria,[f] "are always several ages behind the actual improvement of the nation which they govern." If this observation is true, and I believe it to be true, with regard to law in general; it is peculiarly true, and its truth is of peculiar importance, with regard to criminal law in particular. It is the observation of Sir William Blackstone, that, in every country of Europe, the criminal is more rude and imperfect than the civil law. Unfortunate it is that this should be the case. For on the excellence of the criminal law the liberty and happiness of the citizens chiefly depend.

We are told by Montesquieu, that the knowledge, with regard to the surest rules, observed in criminal judgments, is more interesting to mankind than any other thing in the universe. We are told by him further, that liberty can be founded only on the practice of this knowledge. But how can this knowledge be acquired—how can it become the foundation of practice, if the laws, and particularly the criminal laws, are written in a manner in which they cannot be clearly known or understood.

Deeply penetrated with the truth and the force of these remarks, which are supported by the most respectable authorities, I shall not justly incur the censure of innovation, if I express my opinion, that the law should be written in the same manner, which we use when we write on other subjects, or other sciences. This manner has been already adopted, with success, in the Constitution of the United States, and in that of Pennsylvania.

[f] C. 29.

As, however, the observations, which I have made and quoted, bear particularly upon the criminal code; I propose to make, in that code, the first experiment of their justness and efficacy.

The criminal law, though the most important, is by far the least voluminous part of the system; and it can be easily formed into a separate report. This I mean to do. By doing so, I shall have a fair opportunity of exhibiting a specimen of the manner and the merits both of my plan and of its execution.

To the Speaker of the House of Representatives.

In the execution of this plan, the Author made very considerable progress. It had been undertaken, however, under the authority of only one of the houses of the assembly, without the sanction of the other; and, in the course of its execution, it was found, that the want of legislative sanction, and of a provision for making pecuniary compensation to persons necessarily employed as assistants in a work of so much labour and importance, joined with the difficulty of obtaining many useful and necessary books connected with the subject of the work, had retarded its progress, and thrown considerable impediments in the way of its completion. An attempt was made to remove these obstacles; and a bill was passed for that purpose by the house of representatives; but it was unfortunately negatived by the senate. The design of framing a digest under the authority of the legislature was, of course, relinquished. But the Author still contemplated the execution of a similar design, as a private work; supported only by his own name; and it occupied, for a long time, his assiduous attention. He had, in a

great degree, prepared the materials; but did not live to arrange them, and compose the contemplated digest.

From these causes, the lectures continued in the state, in which they now appear. The Editor has not thought himself at liberty to make any alterations in the language of the Author: the lecturing style is, therefore, retained. He has, however, been obliged to adopt a division not, perhaps, strictly in unison with that style, but the only one which was in his power—that into parts and chapters, according to the subjects. They were never divided by the Author into distinct lectures; as, according to his mode of delivering them, they were frequently attended with recapitulations, and often embraced parts of his observations on different subjects.

Of the other parts of the contents of these volumes, the tracts on the legislative authority of parliament over the colonies, and on the Bank of North America, were before published; as were also the speech in convention on 26th November, 1787, and the oration on 4th July, 1788. These, with the other speeches now published, appear to have been selected for publication by the Author himself. His charges to grand juries in the federal courts, the Editor has not thought it proper to insert; because, as they related generally to the history, powers, and duties of juries, the contents of them are to be found in the lectures. One, however, he has selected and inserted, because it contains a concise and handsome view of the criminal law of the United States, nearly as it stands at present, and many important observations not to be found in the other works.

Of the value and merit of these volumes, the Editor will say nothing. He leaves that subject to the judgment

of those who can estimate them with greater impartiality. In some parts, perhaps, they want that degree of polish, which the farther attention and corrections of the Author might have bestowed on them; and repetitions, which sometimes occur, and which, in lectures delivered, are not only excusable but proper, would probably not have been met with, had they been corrected by himself for the press. On the whole, however, the Editor trusts, that they will not be thought unworthy, either in style or sentiment, of the reputation of their Author.

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LECTURES ON LAW,

DELIVERED IN THE

COLLEGE OF PHILADELPHIA,

IN THE YEARS ONE THOUSAND SEVEN HUNDRED AND NINETY,
AND ONE THOUSAND SEVEN HUNDRED AND NINETY ONE.

PART I.

CHAPTER I.

INTRODUCTORY LECTURE.

OF THE STUDY OF THE LAW IN THE UNITED STATES.

LADIES AND GENTLEMEN,

THOUGH I am not unaccustomed to speak in publick, yet, on this occasion, I rise with much diffidence to address you. The character, in which I appear, is both important and new. Anxiety and selfdistrust are natural on my first appearance. These feelings are greatly heightened by another consideration, which operates with peculiar force. I never before had the honour of addressing a *fair* audience. Anxiety and selfdistrust, in an uncommon degree, are natural, when, for the first time, I address a fair audience so brilliant as this is. There is one encouraging reflection, however, which greatly supports me. The whole of my very respectable audience is as much distinguished by its politeness, as a part of it is distinguished by its brilliancy. From that

politeness, I shall receive—what I feel I need—an uncommon degree of generous indulgence.

It is the remark of an admired historian, that the high character, which the Grecian commonwealths long possessed among nations, should not be ascribed solely to their excellence in science and in government. With regard to these, other nations, he thinks, and particularly that of which he was writing the history, were entitled to a reputation, not less exalted and illustrious. But the opinion, he says, of the superiour endowments and achievements of the Grecians has arisen, in a considerable degree, from their peculiar felicity in having their virtues transmitted to posterity by writers, who excelled those of every other country in abilities and elegance.

Alexander, when master of the world, envied the good fortune of Achilles, who had a Homer to celebrate his deeds.

The observation, which was applied to Rome by Sallust, and the force of which appears so strongly from the feelings of Alexander, permit me to apply, for I can apply it with equal propriety, to the States of America.

They have not, it is true, been long or much known upon the great theatre of nations: their immature age has not hitherto furnished them with many occasions of extending their renown to the distant quarters of the globe. But, in real worth and excellence, I boldly venture to compare them with the most illustrious commonwealths, which adorn the records of fame. When some future Xenophon or Thucydides shall arise to do justice

to their virtues and their actions; the glory of America will rival—it will outshine the glory of Greece.

Were I called upon for my reasons why I deem so highly of the American character, I would assign them in a very few words—That character has been eminently distinguished by the love of liberty, and the love of law.

I rejoice in my appointment to this chair, because it gives me the best opportunities to discover, to study, to develop, and to communicate many striking instances, hitherto little known, on which this distinguished character is founded.

In free countries—in free countries, especially, that boast the blessing of a common law, springing warm and spontaneous from the manners of the people—Law should be studied and taught as a historical science.

The eloquent Rousseau complains, that the origin of nations is much concealed by the darkness or the distance of antiquity.

In many parts of the world, the fact may be as he represents it; and yet his complaint may be without foundation: for, in many parts of the world, the origin of nations ought to be buried in oblivion. To succeeding ages, the knowledge of it would convey neither pleasure nor instruction.

With regard to the States of America, I am happy in saying, that a complaint concerning the uncertainty of their first settlements cannot be made with propriety or truth; though I must add, that, if it could be made

with propriety or truth, it would be a subject of the deepest regret.

If the just and genuine principles of society can diffuse a lustre round the establishment of nations; that of the States of America is indeed illustrious. Fierce oppression, rattling, in her left hand, the chains of tyranny; and brandishing, in her right hand, the torch of persecution, drove our predecessors from the coasts of Europe: liberty, benevolent and serene, pointing to a cornucopia on one side, and to a branch of olive on the other, invited and conducted them to the American shores.

In discharging the duties of this office, I shall have the pleasure of presenting to my hearers what, as to the nations in the Transatlantick world, must be searched for in vain—an original compact of a society, on its first arrival in this section of the globe. How the lawyers, and statesmen, and antiquarians, and philosophers of Europe would exult, on discovering a similar monument of the Athenian commonwealth! and yet, perhaps, the historical monuments of the states of America are not, intrinsically, less important, or less worthy of attention, than the historical monuments of the states of Greece. The latter, indeed, are gilded with the gay decorations of fable and mythology; but the former are clothed in the neater and more simple garb of freedom and truth.

The doctrine of toleration in matters of religion, reasonable though it certainly is, has not been long known or acknowledged. For its reception and establishment, where it has been received and established, the world has been thought to owe much to the inesti-

mable writings of the celebrated Locke. To the inestimable writings of that justly celebrated man, let the tribute of applause be plenteously paid: but while immortal honours are bestowed on the name and character of Locke; why should an ungracious silence be observed, with regard to the name and character of Calvert?

Let it be known, that, before the doctrine of toleration was published in Europe, the practice of it was established in America. A law in favour of religious freedom was passed in Maryland, as early as the year one thousand six hundred and forty nine.

When my Lord Baltimore was afterwards urged—not by the spirit of freedom—to consent that this law should be repealed; with the enlightened principles of a man and a christian, he had the fortitude to declare, that he never would assent to the repeal of a law, which protected the natural rights of men, by ensuring to every one freedom of action and thought.

Indeed, the character of this excellent man has been too little known. He was truly the father of his country. To the legislature of Maryland he often recommended a maxim, which deserves to be written in letters of gold: "By concord a small colony may grow into a great and renowned nation; but, by dissensions, mighty and glorious kingdoms have declined and fallen[a] into nothing."

Similar to that of Calvert, has been the fate of many other valuable characters in America. They have been

[a] Chal. 363.

too little known. To those around them, their modest merits have been too familiar, perhaps too uniform, to attract particular and distinguished attention: by those at a distance, the mild and peaceful voice of their virtue has not been heard. But to their memories, justice should be done, as far as it can be done, by a just and grateful country.

In the European temple of fame, William Penn is placed by the side of Lycurgus. Will America refuse a temple to her patriots and her heroes? No; she will not. The glorious dome already rises. Its architecture is of the neatest and chastest order: its dimensions are spacious: its proportions are elegant and correct. In its front a number of niches are formed. In some of them statues are placed. On the left hand of the portal, are the names and figures of Warren, Montgomery, Mercer. On the right hand, are the names and figures of Calvert, Penn, Franklin. In the middle, is a niche of larger size, and decorated with peculiar ornaments. On the left side of it, are sculptured the trophies of war: on the right, the more precious emblems of peace. Above it, is represented the rising glory of the United States. It is without a statue and without a name. Beneath it, in letters very legible, are these words—"FOR THE MOST WORTHY." By the enraptured voice of grateful America—with the consenting plaudits of an admiring world, the designation is unanimously made. Late—very late—may the niche be filled. [b]

But while we perform the pleasing duties of gratitude, let not other duties be disregarded. Illustrious

[b] General Washington, then President of the United States, was present when this lecture was delivered. *Ed.*

examples are displayed to our view, that we may imitate as well as admire. Before we can be distinguished by the same honours, we must be distinguished by the same virtues.

What are those virtues? They are chiefly the same virtues, which we have already seen to be descriptive of the American character—the love of liberty, and the love of law. But law and liberty cannot rationally become the objects of our love, unless they first become the objects of our knowledge. The same course of study, properly directed, will lead us to the knowledge of both. Indeed, neither of them can be known, because neither of them can exist, without the other. Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness. In denominating, therefore, that science, by which the knowledge of both is acquired, it is unnecessary to preserve, in terms, the distinction between them. That science may be named, as it has been named, the science of law.

The science of law should, in some measure, and in some degree, be the study of every free citizen, and of every free man. Every free citizen and every free man has duties to perform and rights to claim. Unless, in some measure, and in some degree, he knows those duties and those rights, he can never act a just and an independent part.

Happily, the general and most important principles of law are not removed to a very great distance from common apprehension. It has been said of religion,

that though the elephant may swim, yet the lamb may wade in it. Concerning law, the same observation may be made.

The home navigation, carried on along the shores, is more necessary, and more useful too, than that, which is pursued through the deep and expanded ocean. A man may be a most excellent coaster, though he possess not the nautical accomplishments and experience of a Cook.

As a science, the law is far from being so disagreeable or so perplexed a study, as it is frequently supposed to be. Some, indeed, involve themselves in a thick mist of terms of art; and use a language unknown to all, but those of the profession. By such, the knowledge of the law, like the mysteries of some ancient divinity, is confined to its initiated votaries; as if all others were in duty bound, blindly and implicitly to obey. But this ought not to be the case. The knowledge of those rational principles on which the law is founded, ought, especially in a free government, to be diffused over the whole community.

In a free country, every citizen forms a part of the sovereign power: he possesses a vote, or takes a still more active part in the business of the commonwealth. The right and the duty of giving that vote, the right and the duty of taking that share, are necessarily attended with the duty of making that business the object of his study and inquiry.

In the United States, every citizen is frequently called upon to act in this great publick character. He elects the legislative, and he takes a personal share in the

executive and judicial departments of the nation. It is true, that a man, who wishes to be right, will, with the official assistance afforded him, be seldom under the necessity of being wrong: but it is equally true, and it ought not to be concealed, that the publick duties and the publick rights of every citizen of the United States loudly demand from him all the time, which he can prudently spare, and all the means which he can prudently employ, in order to learn that part, which it is incumbent on him to act.

On the publick mind, one great truth can never be too deeply impressed—that the weight of the government of the United States, and of each state composing the union, rests on the shoulders of the people.

I express not this sentiment now, as I have never expressed it heretofore, with a view to flatter: I express it now, as I have always expressed it heretofore, with a far other and higher aim—with an aim to excite the people to acquire, by vigorous and manly exercise, a degree of strength sufficient to support the weighty burthen, which is laid upon them—with an aim to convince them, that their duties rise in strict proportion to their rights; and that few are able to trace or to estimate the great danger, in a free government, when the rights of the people are unexercised, and the still greater danger, when the rights of the people are ill exercised.

At a general election, too few attend to the important consequences of voting or not voting; and to the consequences, still more important, of voting right or voting wrong.

The rights and the duties of jurors, in the United States, are great and extensive. No punishment can be inflicted without the intervention of one—in much the greater number of cases, without the intervention of more than one jury. Is it not of immense consequence to the publick, that those, who have committed crimes, should not escape with impunity? Is it not of immense consequence to individuals, that all, except those who have committed crimes, should be secure from the punishment denounced against their commission? Is it not, then, of immense consequence to both, that jurors should possess the spirit of just discernment, to discriminate between the innocent and the guilty? This spirit of just discernment requires knowledge of, at least, the general principles of the law, as well as knowledge of the minute particulars concerning the facts.

It is true, that, in matters of law, the jurors are entitled to the assistance of the judges; but it is also true, that, after they receive it, they have the right of judging for themselves: and is there not to this right the great corresponding duty of judging *properly?*

Surely, therefore, those who discharge the important and, let me add, the dignified functions of jurors, should acquire, as far as they possibly can acquire, a knowledge of the laws of their country: for, let me add further, the dignity, though not the importance of their functions, will greatly depend on the abilities, with which they discharge them.

But in the administration of justice—that part of government, which comes home most intimately to the business and the bosoms of men—there are judges as well

as jurors; those, whose peculiar province it is to answer questions of law, as well as those, whose peculiar province it is to answer questions of fact.

In many courts—in many respectable courts within the United States, the judges are not, and, for a long time, cannot be gentlemen of professional acquirements. They may, however, fill their offices usefully and honourably, the want of professional acquirements notwithstanding. But can they do this, without a reasonable degree of acquaintance with the law?

We have already seen, that, in questions of law, the jurors are entitled to the assistance of the judges: but can the judges give assistance, without knowing what answers to make to the questions which the jury may propose? can those direct others, who themselves know not the road?

Unquestionably, then, those who fill, and those who expect to fill the offices of judges in courts, not, indeed, supreme, but rising in importance and in dignity above the appellation of inferiour, ought to make the strongest efforts in order to obtain a respectable degree of knowledge in the law.

Let me ascend to a station more elevated still. In the United States, the doors of publick honours and publick offices are, on the broad principles of equal liberty, thrown open to all. A laudable emulation, an emulation that ought to be encouraged in a free government, may prompt a man to legislate as well as to decide for his fellow citizens—to legislate, not merely for a single State, but for the most august Union that has yet been formed on the face of the globe.

Should not he, who is to supply the deficiencies of the existing law, know when the existing law is defective? Should not he, who is to introduce alterations into the existing law, know in what instances the existing law ought to be altered?

The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it. The first rule, subservient to the principle of the governing maxim, is, to discover what the law was, before the statute was made. The inference, necessarily resulting from the joint operation of the maxim and the rule, is this, that in explaining a statute, the judges ought to take it for granted, that those, who made it, knew the antecedent law. This certainly implies, that a competent knowledge of, at least, the general principles of law, is of indispensable necessity to those, who undertake the transcendent office of legislation.

I say, a knowledge of the general principles of law: for though an accurate, a minute, and an extensive knowledge of its practice and particular rules be highly useful; yet I cannot conceive it to be absolutely requisite to the able discharge of a legislative trust.

Upon this distinction—and it is an important one—I cannot, perhaps, explain myself better, than by delivering the sentiments, which were entertained, some centuries ago, by a very learned and able judge—I mean the Lord Chancellor Fortescue.

In his excellent book, which he wrote in praise of the laws of England, he uses a number of arguments with his pupil, the prince of Wales, to excite him to

the study of the law. Of these arguments the prince feels and acknowledges the full force. "But," says he, "there is one thing, which agitates my mind in such a manner, that, like a vessel tossed in the tumultuous ocean, I know not how to direct my course: it is, that when I recollect the number of years, which the students of the law employ, before they acquire a sufficient degree of knowledge, I am apprehensive lest, in studies of this nature, I should consume the whole of my youth."

To relieve his pupil from this anxiety, the chancellor cites a passage from the writings of Aristotle, to the following purpose: "We are then supposed to know a thing, when we apprehend its causes and its principles, as high as its original elements."

This maxim the chancellor illustrates, by a reference to several of the sciences; and then draws this general conclusion. "Whoever knows the principles and elements of any science, knows the science itself—generally, at least, though not completely." This conclusion he then applies to the science of law. "In the same manner, when you shall become acquainted with the principles and the elements of law, you may be denominated a lawyer. It will not be necessary for *you*, at a great expense of your time, to scrutinize curious and intricate points of discussion. I know the quickness of your apprehension, and the strength of your genius. Though the legal knowledge accumulated in a series of twenty years is not more than sufficient to qualify one for being a judge; yet, in one year, you will be able to acquire a degree of it sufficient for you; with-

out, even in that year, neglecting your other studies and improvements."[c]

That a law education is necessary for gentlemen intended for the profession of the law, it would be as ridiculous to prove as to deny. In all other countries, publick institutions bear a standing testimony to this truth. Ought this to be the only country without them? Justinian, who did so much for the Roman law, was, as might have been expected, uncommonly attentive to form and establish a proper plan for studying it. All the modern nations of Europe have admitted the profession of their municipal jurisprudence, into their universities and other seminaries of liberal education.

In England, numerous and ample provisions have been made for this purpose. For young gentlemen, there are eight houses of chancery, where they learn the first elements of law. For those more advanced in their studies, there are four inns of court. "All these together," says my Lord Coke,[d] with conscious professional pride, "compose the most illustrious university in the world, for the profession of law." Here lectures have been read, exercises have been performed, and degrees in the common law have been conferred, in the same manner as degrees in the civil and canon law, in other universities.

Besides all these, the Vinerian professorship of law has, not many years ago, been established in the university of Oxford. Of this professorship, the celebrated Sir William Blackstone was the first, who filled the chair.

[c] Fort. de Laud. c. 7. 8.

[d] 3 Rep. Pref. 20.

A question deeply interesting to the American States now presents itself. Should the elements of a law education, particularly as it respects publick law, be drawn entirely from another country—or should they be drawn, in part, at least, from the constitutions and governments and laws of the United States, and of the several States composing the Union?

The subject, to one standing where I stand, is not without its delicacy: let me, however, treat it with the decent but firm freedom, which befits an independent citizen, and a professor in independent states.

Surely I am justified in saying, that the principles of the constitutions and governments and laws of the United States, and the republicks, of which they are formed, are materially different from the principles of the constitution and government and laws of England; for that is the only country, from the principles of whose constitution and government and laws, it will be contended, that the elements of a law education ought to be drawn. I presume to go further: the principles of our constitutions and governments and laws are materially *better* than the principles of the constitution and government and laws of England.

Permit me to mention one great principle, the *vital* principle I may well call it, which diffuses animation and vigour through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.

By Sir William Blackstone, from whose Commentaries, a performance in many respects highly valuable, the elements of a foreign law education would probably be borrowed—by Sir William Blackstone, this great and fundamental principle is treated as a political chimera, existing only in the minds of some theorists; but, in practice, inconsistent with the dispensation of any government upon earth. Let us hear his own words.

'It must be owned that Mr. Locke and other theoretical writers have held, that "there remains still inherent in the people, a supreme power to alter the legislative, when they find the legislative act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those, who gave it." 'But, however just this conclusion may be in theory, we cannot admit it, nor argue from it, under any dispensation of government, at present actually existing. For this devolution of power to the people at large, includes a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.'[e]

And yet, even in England, there have been revolutions of government: there has been one within very little more than a century ago. The learned Author of

[e] 1 Bl. Com. 161. 162.

the Commentaries admits the fact; but denies it to be a ground on which any constitutional principle can be established.

If the same precise "conjunction of circumstances" should happen a second time; the revolution of one thousand six hundred and eighty eight would form a precedent: but were only one or two of the circumstances, forming that conjunction, to happen again; "the precedent would fail us." [f]

The three circumstances, which formed that conjunction, were these: 1. An endeavour to subvert the constitution, by breaking the original contract between the king and people. 2. Violation of the fundamental laws. 3. Withdrawing out of the kingdom.

Now, on this state of things, let us make a supposition—not a very foreign one—and see the consequences, which would unquestionably follow from the principles of Sir William Blackstone. Let us suppose, that, on some occasion, a prince should form a conjunction of only two of the circumstances; for instance, that he should only violate the fundamental laws, and endeavour to subvert the constitution: let us suppose, that, instead of completing the conjunction, by withdrawing out of his government, he should only employ some forty or fifty thousand troops to give full efficacy to the two first circumstances: let us suppose all this—and it is surely not unnatural to suppose, that a prince, who shall form the two first parts of the conjunction, will not, like James the second, run away from the execution of them—let

[f] 1 Bl. Com. 245.

us, I say, suppose all this; and what, on the principles of Sir William Blackstone, would be the undeniable consequence? In the language of the Commentaries, "our precedent would fail us."

But we have thought, and we have acted upon revolution principles, without offering them up as sacrifices at the shrine of revolution precedents.

Why should we not teach our children those principles, upon which we ourselves have thought and acted? Ought we to instil into their tender minds a theory, especially if unfounded, which is contradictory to our own practice, built on the most solid foundation? Why should we reduce them to the cruel dilemma of condemning, either those principles which they have been taught to believe, or those persons whom they have been taught to revere?

It is true, that the learned Author of the Commentaries concludes this very passage, by telling us, that "there are inherent, though latent powers of society, which no climate, no time, no constitution, no contract can ever destroy or diminish." But what does this prove? not that revolution principles are, in his opinion, recognized by the English constitution; but that the English constitution, whether considered as a law, or as a contract, cannot destroy or diminish those principles.

It is the opinion of many, that the revolution of one thousand six hundred and eighty eight did more than set a mere precedent, even in England. But be that as it may: a revolution principle certainly is, and cer-

tainly should be taught as a principle of the constitution of the United States, and of every State in the Union.

This revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancour, or war: it is a principle of melioration, contentment, and peace. It is a principle not recommended merely by a flattering theory: it is a principle recommended by happy experience. To the testimony of Pennsylvania—to the testimony of the United States I appeal for the truth of what I say.

In the course of these lectures, my duty will oblige me to notice some other important principles, very particularly his definition and explanation of law itself, in which my sentiments differ from those of the respectable Author of the Commentaries. It already appears, that, with regard to the very first principles of government, we set out from different points of departure.

As I have mentioned Sir William Blackstone, let me speak of him explicitly as it becomes me. I cannot consider him as a zealous friend of republicanism. One of his survivers or successours in office has characterized him by the appellation of an antirepublican lawyer. On the subject of government, I think I can plainly discover his jealousies and his attachments.

For his jealousies, an easy and natural account may be given. In England, only one specimen of a commonwealth has been exhibited to publick examination; and that specimen was, indeed, an unfavourable one. On trial, it was found to be unsound and

unsatisfactory. It is not very surprising that an English lawyer, with an example so inauspicious before his eyes, should feel a degree of aversion, latent, yet strong, to a republican government.

An account, perhaps equally natural and easy, may be given for his attachments. With all reigning families, I believe, it is a settled maxim, that every revolution in government is unjustifiable, except the single one, which conducted them to the throne. The maxims of the court have always their diffusive influence. That influence, in favour of one species of government, might steal imperceptibly upon a mind, already jealous of another species, viewed as its rival, and as its enemy.

But, with all his prejudices concerning government, I have the pleasure of beholding him, in one conspicuous aspect, as a friend to the rights of men. To those rights, the author of the beautiful and animated dissertations concerning juries could not be cold or insensible.

As author of the Commentaries, he possessed uncommon merit. His manner is clear and methodical; his sentiments—I speak of them generally—are judicious and solid; his language is elegant and pure. In publick law, however, he should be consulted with a cautious prudence. But, even in publick law, his principles, when they are not proper objects of imitation, will furnish excellent materials of contrast. On every account, therefore, he should be read and studied. He deserves to be much admired; but he ought not to be implicitly followed.

This last admonitory remark should not be confined to Sir William Blackstone: it ought to be extended to all political writers—must I say?—almost without exception. This seems a severe sentence: but, if it is just, it must be pronounced. The cause of liberty, the rights of men require, that, in a subject essential to that cause and to those rights, errour should be exposed, in order to be avoided.

The foundations of political truth have been laid but lately: the genuine science of government, to no human science inferiour in importance, is, indeed, but in its infancy: and the reason of this can be easily assigned. In the whole annals of the Transatlantick world, it will be difficult to point out a single instance of its legitimate institution: I will go further, and say, that, among all the political writers of the Transatlantick world, it will be difficult to point out a single model of its unbiassed theory.

The celebrated Grotius introduces what he says concerning the interesting doctrine of sovereignty, with the following information. "Learned men of our age, each of them handling the argument, rather according to the present interest of the affairs of his country, than according to truth, have greatly perplexed that, which, of itself, was not very clear."[g] In this, the learned men of every other age have resembled those of the age of Grotius.

Indeed, it is astonishing, in what intricate mazes politicians and philosophers have bewildered themselves

[g] Gro. b. i. c. 3. s. 5.

upon this subject. Systems have been formed upon systems, all fleeting, because all unfounded. Sovereignty has sometimes been viewed as a star, which eluded our investigation by its immeasurable height: sometimes it has been considered as a sun, which could not be distinctly seen by reason of its insufferable splendour.

In Egypt, the Nile is an object truly striking and grand. Its waters, rising to a certain height, and spreading to a certain distance, are the cause of fertility and plenty: swelling higher, and extending further, they produce devastation and famine. This stupendous stream, at some times so beneficial, at other times so destructive, has, at all times, formed a subject of anxious inquiry. To trace its source has been the unceasing aim of the mighty and the learned. Kings, attended with all the instruments of strength; sages, furnished with all the apparatus of philosophy, have engaged, with ardour, in the curious search; but their most patient and their most powerful enterprises have been equally vain.

The source of the Nile continued still unknown; and because it continued still unknown, the poets fondly fabled that it was to be found only in a superiour orb; and, of course, it was worshipped as a divinity.

We are told, however, that, at last, the source of the Nile has been discovered; and that it consists of—what might have been supposed before the discovery—a collection of springs small, indeed, but pure.

The fate of sovereignty has been similar to that of the Nile. Always magnificent, always interesting to mankind, it has become alternately their blessing and their curse.

Its origin has often been attempted to be traced. The great and the wise have embarked in the undertaking; though seldom, it must be owned, with the spirit of just inquiry; or in the direction, which leads to important discovery. The source of sovereignty was still concealed beyond some impenetrable mystery; and, because it was concealed, philosophers and politicians, in this instance, gravely taught what, in the other, the poets had fondly fabled, that it must be something more than human: it was impiously asserted to be divine.

Lately, the inquiry has been recommenced with a different spirit, and in a new direction; and although the discovery of nothing very astonishing, yet the discovery of something very useful and true, has been the result. The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.

This truth, so simple and natural, and yet so neglected or despised, may be appreciated as the first and fundamental principle in the science of government.

Besides the reasons, which I have already offered; others may be suggested, why the elements of a law education ought to be drawn from our own constitutions and governments and laws.

In every government, which is not altogether despotical, the institution of youth is of some publick consequence. In a republican government, it is of the greatest. Of no class of citizens can the education be of more publick consequence, than that of those, who are destined to take an active part in publick affairs. Those who have

had the advantage of a law education, are very frequently destined to take this active part. This deduction clearly shows, that, in a free government, the principles of a law education are matters of the greatest publick consequence.

Ought not those principles to be congenial with the principles of government? By the revolution in the United States, a very great alteration—a very great improvement—as we have already seen, has taken place in our system of government: ought not a proportioned alteration—ought not a proportioned improvement to be introduced into our system of law education?

We have passed the Red Sea in safety: we have survived a tedious and dangerous journey through the wilderness: we are now in full and peaceable possession of the promised land: must we, after all, return to the flesh pots of Egypt? Is there not danger, that when one nation teaches, it may, in some instances, give the law to another?

A foundation of human happiness, broader and deeper than any that has heretofore been laid, is now laid in the United States: on that broad and deep foundation, let it be our pride, as it is our duty, to build a superstructure of adequate extent and magnificence.

But further; many parts of the laws of England can, in their own nature, have neither force nor application here. Such are all those parts, which are connected with ecclesiastical jurisdiction and an ecclesiastical establishment. Such are all those parts, too, which relate to the monarchical and aristocratick branches of the English

constitution. Every one, who has perused the ponderous volumes of the law, knows how great a proportion of them is filled with the numerous and extensive titles relating to those different subjects. Surely they need not enter into the elements of a law education in the United States.

I mean not, however, to exclude them from the subsequent investigation of those, who shall aspire at the character of accomplished lawyers. I only mean, that they ought not to be put into the hands of students, as deserving the same time and the same attention with other parts, which are to have a practical influence upon their future conduct in their profession.

The numerous regulations, in England, respecting the poor, and the more artificial refinements and distinctions concerning real estates, must be known; but known as much in order to be avoided as to be practised. The study of them, therefore, need not be so minute here as in England.

Concerning many other titles of the English law, similar observations might be made. The force and the extent of each will increase day after day, and year after year.

All combine in showing, that the *foundation*, at least, of a separate, an unbiassed, and an independent law education should be laid in the United States.

Deeply impressed with the importance of this truth, I have undertaken the difficult, the laborious, and the delicate task of contributing to lay that foundation. I feel most sensibly the weight of the duty, which I have

engaged to perform. I will not promise to perform it successfully—as well as it might be performed: but I will promise to perform it faithfully—as well as I can perform it. I feel its full importance.

It may be asked—I am told it has been asked—is it proper that a judge of the supreme court of the United States should deliver lectures on law? It will not surely be suspected, that I deem too lightly of the very dignified and independent office, which I have the honour to hold, in consequence of the favourable sentiments entertained concerning me by those, whose favourable sentiments are indeed an honour. Had I thought that the dignity of that seat could be disparaged by an alliance with this chair, I would have spurned it from me. But I thought, and I still think in a very different manner. By my acceptance of this chair, I think I shall certainly increase my usefulness, without diminishing my dignity, as a judge; and I think, that, with equal certainty, I shall, as a judge, increase my usefulness, I will not say my dignity, in this chair. He, who is well qualified to teach, is well qualified to judge; and he, who is well qualified to judge, is well qualified to teach. Every acquisition of knowledge—and it is my duty to acquire much—can, with equal facility, and with equal propriety, be applied to either office: for let it be remembered, that both offices view the same science as their common object.

Any interference as to the times of discharging the two offices—the only one that strikes me as possible—will be carefully avoided.

But it may be further asked—ought a judge to commit himself by delivering his sentiments in a lecture? To

this question I shall give a very explicit answer: and in that answer I shall include the determination, which I have taken both as a professor and as a judge. When I deliver my sentiments from this chair, they shall be my honest sentiments: when I deliver them from the bench, they shall be nothing more. In both places I shall make—because I mean to support—the claim to integrity: in neither shall I make—because, in neither, can I support—the claim to infallibility.

My house of knowledge is, at present, too small. I feel it my duty, on many accounts, to enlarge it. But in this, as in every other kind of architecture, I believe it will be found, that he, who adds much, must alter some.

When the greatest judges, who ever adorned or illuminated a court of justice, have candidly and cheerfully acknowledged their mistakes; shall *I* be afraid of committing myself?

The learned and indefatigable Spelman, after all the immense researches, which enabled him to prepare and publish his Glossary, published it with this remarkable precaution: "under the protestation of adding, retracting, correcting, and polishing, as, upon more mature consideration, shall seem expedient."[h]

I hope I have now shown, that my acceptance of this chair, instead of diminishing, is calculated to increase my usefulness, as a judge. Does it derogate from my dignity? By no means, in my opinion.

[h] Sub protestatione de addendo, retrahendo, corrigendo, poliendo, prout opus fuerit et consultius videbitur. Sir H. Spelman.

Let things be considered as they really are. As a judge, I can decide whether property in dispute belongs to the man on my right hand, or to the man on my left hand. As a judge, I can pass sentence on a felon or a cheat. By doing both, a judge may be eminently useful in preserving peace, and in securing property.

Property, highly deserving security, is, however, not an end, but a means. How miserable, and how contemptible is that man, who inverts the order of nature, and makes his property, not a means, but an end!

Society ought to be preserved in peace; most unquestionably. But is this all? Ought it not to be improved as well as protected? Look at individuals: observe them from infancy to youth, from youth to manhood. Such is the order of Providence with regard to society. It is in a progressive state, moving on towards perfection. How is this progressive state to be assisted and accelerated? Principally by teaching the young "ideas how to shoot," and the young affections how to move.

What intrinsically can be more dignified, than to assist in preparing tender and ingenuous minds for all the great purposes, for which they are intended! What, I repeat it, can intrinsically be more dignified, than to assist in forming a future Cicero, or a future Bacon, without the vanity of one, and without the meanness of theother!

Let us see how things have been considered in other ages and in other countries.

Philip of Macedon, a prince highly distinguished by his talents, though not by his virtues, was fully sensible

of the value of science. An heir was born to his kingdom and his throne. Could any thing be more interesting to a father and a king? There was, it seems, a circumstance, which, in his opinion, enhanced the importance even of this event. His heir was born at a time, when he could receive a most excellent education.

Philip wrote to Aristotle the following letter: "You are to know that a son hath been born to us. We thank the gods, not so much for having bestowed him on us, as for bestowing him, at a time when Aristotle lives. We assure ourselves, that you will form him a prince worthy to be our successour, and a king worthy of Macedon."[i]

On Aristotle, accordingly, was devolved the charge of superintending the education of the young prince, "that he may be taught," said Philip, "to avoid those errours, which I have committed, and of which I now repent."

What price Alexander the Great set upon his education, before his mind was fatally poisoned by the madness of ambition, will appear by a letter from him to Aristotle, in which we find this sentiment: "I am not so anxious to appear superiour to the rest of mankind in power, as in the knowledge of excellent things."[k] We see here the impetus of strong ambition; but it had not then taken its pernicious direction.

In the most shining periods of the Roman republick, men of the first distinction made the science of law their publick profession, and taught it openly in their houses

[i] 1 Lel. L. Phil. 98. [k] 2 Lel. L. Phil. 126.

as in so many schools. The first of these publick professors was Tiberius Coruncanius, who was raised to the office of chief pontiff—the highest in the whole scale of Roman honours. His example was followed by many distinguished characters, among whom we find the celebrated names of the two Scevolæ, of Cato, of Brutus, and of others well known to such as are conversant with the writers of the classical ages. Even Cicero himself, after he had been consul of Rome, after he had had kings for his clients, projected this very employment, as his future "honour and ornament."[1]

Whether, therefore, we consider the intrinsick or the external dignity of this chair; we shall find that it is, by no means, beneath an alliance with the highest offices and the highest characters.

If any example, set by me, can be supposed to have the least publick influence; I hope it will be in raising the care of education to that high degree of respectability, to which, every where, but especially in countries that are free, it has the most unimpeachable title.

I have been zealous—I hope I have not been altogether unsuccessful—in contributing the best of my endeavours towards forming a system of government; I shall rise in importance, if I can be equally successful—I will not be less zealous—in contributing the best of my endeavours towards forming a system of education likewise, in the United States. I shall rise in importance, because I shall rise in usefulness.

[1] Decus et ornamentum. De orat. l. 1. c. 45.

What are laws without manners? How can manners be formed, but by a proper education? [m]

Methinks I hear one of the female part of my audience exclaim—What is all this to us? We have heard much of societies, of states, of governments, of laws, and of a law education. Is every thing made for your sex? Why should not we have a share? Is our sex less honest, or less virtuous, or less wise than yours?

Will any of my brethren be kind enough to furnish me with answers to these questions?—I must answer them, it seems, myself? and I mean to answer them most sincerely.

Your sex is neither less honest, nor less virtuous, nor less wise than ours. With regard to the two first of these qualities, a superiority, on our part, will not be pretended: with regard to the last, a pretension of superiority cannot be supported.

I will name three women; and I will then challenge any of my brethren to name three men superiour to them in vigour and extent of abilities. My female champions are, Semiramis of Nineveh; Zenobia, the queen of the East; and Elizabeth of England. I believe it will readily be owned, that three men of superiour active talents cannot be named.

m The ancient wisdom of the best times did always make a just complaint, that states were too busy with their laws; and too negligent in point of education. 2. Ld Bacon 423.

You will please, however, to take notice, that the issue, upon which I put the characters of these three ladies, is not that they were *accomplished;* it is, that they were *able* women.

This distinction immediately reminds you, that a woman may be an able, without being an accomplished female character.

In this latter view, I did not produce the three female characters I have mentioned. I produced them as women, merely of distinguished abilities—of abilities equal to those displayed by the most able of our sex.

But would you wish to be tried by the qualities of our sex? I will refer you to a more proper standard—that of your own.

All the three able characters, I have mentioned, had, I think, too much of the masculine in them. Perhaps I can conjecture the reason. Might it not be owing, in a great measure—might it not be owing altogether to the masculine employments, to which they devoted themselves?

Two of them were able warriours: all of them were able queens; but in all of them, we feel and we regret the loss of the lovely and accomplished woman: and let me assure you, that, in the estimation of our sex, the loss of the lovely and accomplished woman is irreparable, even when she is lost in the queen.

For these reasons, I doubt much, whether it would be proper that you should undertake the management of publick affairs. You have, indeed, heard much of pub-

lick government and publick law: but these things were not made for themselves: they were made for something better; and of that something better, you form the better part—I mean society—I mean particularly domestick society: there the lovely and accomplished woman shines with superiour lustre.

By some politicians, society has been considered as only the scaffolding of government; very improperly, in my judgment. In the just order of things, government is the scaffolding of society: and if society could be built and kept entire without government, the scaffolding might be thrown down, without the least inconvenience or cause of regret.

Government is, indeed, highly necessary; but it is highly necessary to a fallen state. Had man continued innocent, society, without the aids of government, would have shed its benign influence even over the bowers of Paradise.

For those bowers, how finely was your sex adapted! But let it be observed, that every thing else was finished, before Heaven's "last best gift" was introduced: let it be also observed, that, in the pure and perfect commencement of society, there was a striking difference between the only two persons, who composed it. His "large fair front and eye sublime" declared that, "for contemplation and for valour he was formed."

"For softness, she, and sweet attractive grace.
Grace was in all her steps, Heav'n in her eye;
In every gesture, dignity and love.
A thousand decencies unceasing flow'd
From all her words and actions, mixt with—
———mild compliance."

Her accomplishments indicated her destination. Female beauty is the expression of female virtue. The purest complexion, the finest features, the most elegant shape are uninteresting and insipid, unless we can discover, by them, the emotions of the mind. How beautiful and engaging, on the other hand, are the features, the looks, and the gestures, while they disclose modesty, sensibility, and every sweet and tender affection! When these appear, there is a "Soul upon the countenance."

These observations enhance the value of beauty; and show, that to possess and to admire it, is to possess and to admire the exhibition of the finest qualities, intellectual and moral. These observations do more: they show how beauty may be acquired, and improved, and preserved. When the beauties of the mind are cultivated, the countenance becomes beautifully eloquent in expressing them.

I know very well, that mere complexion and shape enter into the composition of beauty: but they form beauty only of a lower order. Separate them from animation—separate them from sensibility—separate them from virtue: what are they? The ingredients that compose a beautiful picture or a beautiful statue. I say too much; for the painters and the statuaries know, that expression is the soul of mimick as well as of real life.

As complexion and shape will not supply the place of the higher orders of beauty; so those higher orders have an independent existence, after the inferiour influence of complexion and shape are gone. Though the bloom of youth be faded; though the impressions of

time be distinctly marked; yet, while the countenance continues to be enlivened by the beaming emanations of the mind, it will produce, in every beholder possessed of sensibility and taste, an effect far more pleasing, and far more lasting, than can be produced by the prettiest piece of uninformed nature, however florid, however regular, and however young.

How many purposes may be served at once, if things are done in the proper way! I have been giving a recipe for the improvement and preservation of female beauty; but I find that I have, at the same time, been delivering instructions for the culture and refinement of female virtue; and have been pointing at the important purposes, which female virtue is fitted and intended to accomplish.

If nature evinces her designs by her works; you were destined to embellish, to refine, and to exalt the pleasures and virtues of social life.

To protect and to improve social life, is, as we have seen, the end of government and law. If, therefore, you have no share in the formation, you have a most intimate connexion with the effects, of a good system of law and government.

That plan of education, which will produce, or promote, or preserve such a system, is, consequently, an object to you peculiarly important.

But if you would see such a plan carried into complete effect, you must, my amiable hearers, give it your powerful assistance. The pleasing task of forming

your daughters is almost solely yours. In my plan of education for your sons, I must solicit you to cooperate. Their virtues, in a certain proportion—the refinement of their virtues, in a much greater proportion, must be moulded on your example.

In your sex, too, there is a natural, an easy, and, often, a pure flow of diction, which lays the best foundation for that eloquence, which, in a free country, is so important to ours.

The style of some of the finest orators of antiquity was originally formed on that of their mothers, or of other ladies, to whose acquaintance they had the honour of being introduced.

I have already mentioned the two Scevolæ among the illustrious Roman characters. One of them was married to Lælia, a lady, whose virtues and accomplishments rendered her one of the principal ornaments of Rome. She possessed the elegance of language in so eminent a degree, that the first speakers of the age were ambitious of her company. The graces of her unstudied elocution were the purest model, by which they could refine their own.

Cicero was in the number of those, who improved by the privilege of her conversation. In his writings, he speaks in terms of the warmest praise concerning her singular talents. He mentions also the conversation of her daughters and grand daughters, as deserving particular notice.

The province of early education by the female sex, was deemed, in Rome, an employment of so much dig-

nity, that ladies of the first rank did not disdain it. We find the names of Aurelia and Attia, the mothers of Julius Cæsar and of Augustus, enumerated in the list of these honourable patronesses of education.

The example of the highly accomplished Cornelia, the daughter of the great Africanus, and the mother of the Gracchi, deserves uncommon attention. She shone, with singular lustre, in all those endowments and virtues that can dignify the female character.

She was, one day, visited by a lady of Campania, who was extremely fond of dress and ornament. This lady, after having displayed some very rich jewels of her own, expressed a wish to be favoured with the view of those which Cornelia had; expecting to see some very superb ones, in the toilet of a lady of such distinguished birth and character. Cornelia diverted the conversation, till her sons came into the room: "These are my jewels," said she, presenting them to the Campanian lady.

Cicero had seen her letters: his expressions concerning them are very remarkable. "I have read," says he, "the letters of Cornelia, the mother of the Gracchi; and it appears, that her sons were not so much nourished by the milk, as formed by the style of their mother."[n]

You see now, my fair and amiable hearers, how deeply and nearly interested you are in a proper plan of law

[n] Legimus epistolas Corneliæ, matris Gracchorum: apparet filios non tam in gremio educatos, quam in sermone matris. Cic. de clar. orat. c. 58.

education. By some of you, whom I know to be well qualified for taking in it the share, which I have described, that share will be taken. By the younger part of you, the good effects of such a plan will, I hope, be participated: for those of my pupils, who themselves shall become most estimable, will treat you with the highest degree of estimation,

PLAN.

GENTLEMEN,

PERMIT me, at this time, to address, in a very few words, the younger and more inexperienced part of those who attend my lectures—I say the younger and more inexperienced part; because my lectures are honoured with the presence of some, whose learning, talents, and experience fit them for communicating instead of receiving instruction here. For the honour of their presence, I must consider myself indebted to the importance of my subject; and to a desire, generous and enlightened, of countenancing and encouraging every attempt, however feeble, to diffuse knowledge on a subject so important.

You have seen, my young friends, in what a high point of view I consider your education. Is this on your own account? Partly it is—that you may be great and good men. But solely it is not; for more extended hopes are entertained concerning you: you are designated by your education, and by your country, to be great and good citizens.

In no other part of the world, and in no former period, even in this part of it, have youth ever beheld so glorious and so sublime a prospect before them. Your country is already respectable for its numbers; it is free; it is enlightened; it is flourishing; it is happy: in numbers; in liberty; in knowledge; in prosperity; in happiness it is receiving great and rapid accessions. Its honours are already beginning to bud: in a few years, they will "blossom thick" upon you. You ought certainly, by proper culture, to qualify yourselves in such a manner, that when the blossoms fade and fall, the fruit may begin to appear. Remember that, in a free government, every honour implies a trust; that every trust implies a duty; and that every duty ought to be performed.

I mean not, that such of you as are designed for the practice of the law, should be inattentive to the emoluments of your profession; but I mean that you should consider it as something higher than a mere instrument of private gain. By being fitted for higher purposes, it will not be less fit, it will be more fit for accomplishing this.

It is peculiarly necessary, that you should, as soon as possible, form proper conceptions of what ought to be your objects in your course of study. Let them not be fixed too low: the higher your aims, the higher your attainments will be. To assist you in fixing those aims, let me lay before you the sentiments of a writer, who wrote on some subjects most excellently, and on others most contemptibly—I mean Lord Bolingbroke. When he wrote on politicks or business, he wrote well; because he wrote on what he knew: when he wrote concerning religion, he wrote ill; because he wrote concerning that,

of which he was ignorant. The passage I am about to quote to you is vouched by the respectable authority of Lord Kaims, who considered it, and justly, as a master piece of expression and thought.

"I might instance," says he, "in other professions, the obligations men lie under of applying themselves to certain parts of history; and I can hardly forbear doing it in that of the law, in its nature, the noblest and most beneficial to mankind, in its abuse and debasement, the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety nine in a hundred at least" (the proportion in this country, I believe, is much smaller) "to use some of Tully's words, "nisi liguleius quidam cautus, et acutus præco actionum, cantor formularum, anceps syllabarum:" but there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till, in some better age" (I hope that better age has found you, my young friends) "true ambition or the love of fame prevail over avarice; and till men find leisure and encouragement for the exercise of this profession, by climbing up to the vantage ground, so my Lord Bacon calls it, of science,* instead of groveling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of law will scarce deserve to be ranked among the learned professions: and whenever it happens, one of the vantage grounds, to which men must climb, is metaphysical, and the other, historical knowledge." By

* It is not possible to discover the more remote, and deeper parts of any science, if you stand but upon the level of the same science, and ascend not to a higher science. 2. Ld. Bac. 432.

metaphysical knowledge, his lordship evidently means the philosophy of the human mind; for he goes on in this manner. "They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced."[p]

Such, my young friends, are the great prospects before you; and such is the general outline of those studies, by which you will be prepared to realize them. Suffer me to recommend most earnestly this outline to the utmost degree of your attention. It comes to you supported with all the countenance and authority of Bacon, Bolingbroke, Kaims—two of them consummate in the practice, as well as in the knowledge of the law—all of them eminent judges of men, of business, and of literature; and all distinguished by the accomplishments of an active, as well as those of a contemplative life. The propriety, the force, and the application of their sentiments will be gradually unfolded, fully explained, and warmly urged to you in the course of my lectures.

It is by no means an easy matter to form, to digest, and to arrange a plan of lectures, on a subject so various and so extensive as that of law. With great deference to some of you, with anxious zeal for the information of others, I lay before you the following analysis: reserving, however, to myself, the full right and force of the protestation, which I have already borrowed

[p] Boling. of the Study of History. let. 5. p. 149.

from Sir Henry Spelman, of adding, retracting, correcting, and polishing, as, on more mature consideration, shall appear to me to be expedient. [q]

I begin with the general principles of law and obligation. These I shall investigate fully and minutely; because they are the basis of every legal system; and because they have been much misrepresented, or much misunderstood.

Next, I shall proceed to give you a concise and very general view of the law of nature, of the law of nations, and of municipal law.

I shall then consider man, who is the subject of all, and is the author as well as the subject of the last, and part of the second of these species of law. This great title of my plan, dignified and interesting as it is, must be treated in a very cursory manner in this course. I will, however, select some of the great truths which seem best adapted to a system of law. I will view man as an individual, as a member of society, as a member of a confederation, and as a part of the great commonwealth of nations.

His situation, under the third relation, is, in a great measure, new; and, to an American, peculiarly important: It will, therefore, merit and obtain peculiar attention.

The proper discussion of this title will draw on a discussion of the law of nations, under an aspect, almost

[q] Some alterations, as the reader will observe, were afterwards made in the plan; but they are neither numerous nor important and need not be here particularized. Ed.

wholly new. How far, on the principles of the confederation, does the law of nations become the municipal law of the United States? The greatness of this question is selfevident: it would be very unwise, at present, even to hint at an answer.

After having examined these important preparatory topicks, I shall trace the causes, the origin, the progress, the history, the kinds, the parts, and the properties of government.

Under this title, I shall have occasion to treat concerning legislative, executive, and judicial power; and to investigate and compare the simple and the mixt species of governments and constitutions—one, particularly, that is simple in its principle, though diversified in its form and operations.

This will lead me to a particular examination of the constitution and government of the United States, of Pennsylvania, and of her sister commonwealths.

By this time, we shall be qualified to enter, with proper advantage, upon the illustration of the different parts of our municipal law. The common law is the first great object, which will here present itself. I shall think it my duty to investigate very carefully its principles, its nature, and its history; particularly the great event of its transmigration from Europe to America; and the subsequent juridical history of the American States.

Our municipal law, I shall consider under two great divisions. Under the first, I shall treat of the law, as it

relates to persons: under the second, I shall treat of it, as it relates to things.

The division of the United States into circuits, districts, states, counties, and townships will, probably, be introduced here, with some remarks concerning the causes, the operation, and the consequences of those divisions.

In considering the law as it relates to persons, the legislative department of the United States will occupy the first place; the executive department, the second; and the judicial department, the third.

Under the first, the institution and powers of congress will come into view. The principles on which the senate and house of representatives are separately established, will be carefully discriminated; and the necessary remarks will be made on the great doctrine of representation. The importance and the manner of legislation will also claim a portion of our regard.

In considering the executive authority of the United States, the appointment, the powers, and the duties of the president, will first attract our notice. We will then proceed to consider the number and the nature of the subordinate executive departments. We shall here have an opportunity of taking a very general view of the civil, commercial, fiscal, maritime, and military establishments of the United States.

When we come to the judicial department, our attention will be first drawn to the supreme court of the United States. Its establishment and its jurisdiction will

be particularly considered; as also the establishment and jurisdiction of the circuit and district courts.

Here the nature, the history, and the jurisdiction of courts in general; and the powers and duties of judges, juries, sheriffs, coroners, counsellors, and attornies will be naturally introduced.

Perhaps this may be the proper place, likewise, for some general observations on the nature and philosophy of evidence; a proper system of which is the greatest desideratum in the law.

The investigation of the different parts of the constitution and government of the United States, will lay the foundation of a very interesting parallel between them and the pride of Europe—the British constitution.

If the consideration of the legislative, executive, and judicial departments of the sister states can, without intricacy or confusion, be severally arranged under the three corresponding articles in the constitution of the United States; the parts of my plan will be considerably reduced in their number. I hope, but I am not confident, that this can be done. Upon this, as upon every other part of my plan, I shall be thankful for advice.

Bodies politick and inferiour societies will be described and distinguished.

The relations of private and of domestick life will pass in review before us; and after these, the rights and duties of citizens will come under consideration.

Here the important principles of election will receive the merited attention.

The rights, privileges, and disabilities of aliens will then be examined.

Happy would it be, if the great division of the law, which relates to persons, could be closed here. But it cannot be done. We are under the sad necessity of viewing law as sometimes violated, and man as sometimes guilty. Hence the ungracious doctrine of punishment and crimes.

I will introduce this disagreeable part of my system with general observations concerning the nature of crimes, and the necessity and the proportion of punishments: next, I will descend into a particular enumeration and description of each: and I will afterwards point out the different steps prescribed by the law for apprehending, detaining, trying, and punishing offenders.

Here warrants, arrests, attachments, bail, commitments, imprisonment, appeals, informations, indictments, presentments, process, arraignments, pleas, trials, verdicts, judgments, attainders, pardons, forfeitures, corruption of blood, and executions will be considered.

With regard to criminal law, this observation may be made even in a summary: it greatly needs reformation. In the United States, the seeds of reformation are sown.

As to the second great division of our municipal law, which relates to things; it may be all comprehended under one word—property. Claims, it is true, may

arise from a variety of sources, almost infinite: but the declaration of every claim concludes by alleging a damage or a demand; and the decision of every successful claim concludes by awarding a satisfaction or a restitution in property.

I shall trace the history of property from its lowest rude beginnings to its highest artificial refinements; and, by that means, shall have an opportunity of pointing out the defects of the first, and the excesses of the last.

Property is of two kinds; publick and private. Under publick property, common highways, common bridges, common rivers, common ports are included. In the United States, and in the states composing the Union, there is much land belonging to the publick.

Private property is divided into two kinds; personal and real: things moveable are comprehended under the first division: things immoveable, under the second.

Estates in real property are measured by their duration. An estate of the greatest duration, is that which is in fee, or "to a man and his heirs," in the language of the common law. Real property of shorter duration is known by the names of estates tail, estates in tail after possibility of issue extinct, estates by the curtesy of England, estates in dower, estates for life, estates for years, estates by sufferance, and estates at will.

Estates may be either absolute or conditional. Under the title of conditional estates, the excellent law of Pennsylvania with regard to mortgages will deserve particular consideration.

Estates may be in possession or in expectancy. Under the last head, reversions, remainders, vested and contingent, and executory devises will be treated.

Property may be joint or cotemporary, as well as separate and successive. Here we will treat concerning coparceners, partners, joint tenants, and tenants in common.

Property may be acquired by occupancy, conveyance, descent, succession, will, custom, forfeiture, judgment in a court of justice. In much the greatest number of instances, the acquisition of property by one is accompanied with the transfer of it by another.

Conveyances are by matter of record; as a fine, a common recovery, a deed enrolled: or by matter in pais; as livery, deed: here the nature and different kinds of deeds, at common law, and by virtue of statutes, will be particularly considered.

Property may consist of things in possession, or of things in action.

Land, money, cattle, are instances of the first kind; debts, rights of damages, and rights of action are instances of the second kind.

These are prosecuted by suit.

You have heard much concerning the forms of process, and proceedings, and pleadings. Much has been written in praise, and much has been written in ridicule, of this part of law learning. It has certainly been abused: in some hands, it has become, and daily

does become ridiculous. And what is there that has been exempted from a similar fate! religion herself, elegant and simple as she is, yet, when dressed in the tawdry or tattered robes put upon her by the false taste of her injudicious friends, assumes an awkward and ridiculous appearance.

Law has experienced the same treatment with her elder sister. But though the learning with regard to pleas and pleading has been abused, it may certainly be employed for the most excellent purposes.

When properly directed and properly used, the science of well pleading is, indeed, in the language of Littleton, "one of the most honourable, laudable, and profitable things in our law."[r] Let me also adduce, in its favour, the weighty testimony of Earl Mansfield.[s] "The substantial rules of pleading," says this very able judge, "are founded in strong sense, and in the soundest and closest logick; and so appear when well understood and explained: though, by being misunderstood and misapplied, they are too often made use of as the instruments of chicane."

Permit me to add, that some of the forms of writs and pleas, particularly those that are most ancient, are models of correct composition, as well as of just sentiment.

The history of a suit at law, from its commencement, through all the different steps of its progress, to its conclusion, presents an object very interesting to a

[r] Litt. s. 534. [s] 1. Burr. 319.

mind sensible to the beauty of strict and accurate arrangement. The dispositions of the drama are not made with more exactness and art. Every thing is done by the proper persons, at the proper time, in the proper place, in the proper order, and in the proper form.

This history may be comprised under the following titles—original writ, process, return, appearance—in person, by guardian, by next friend, by attorney—bail, declaration, profert, oyer, imparlance, continuance, pleas—in abatement and bar—replication, rejoinder, issue, demurrer, trial, demurrer to evidence, bill of exceptions, verdict, new trial, judgment, appeal, writ of error, execution.

CHAPTER II.

OF THE GENERAL PRINCIPLES OF LAW AND OBLIGATION.

ORDER, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made.

On the inanimate part of the creation, are impressed the continued energies of motion and of attraction, and other energies, varied and yet uniform, all designated and ascertained. Animated nature is under a government suited to every genus, to every species, and to every individual, of which it consists. Man, the *nexus utriusque mundi*, composed of a body and a soul, possessed of faculties intellectual and moral, finds or makes a system of regulations, by which his various and important nature, in every period of his existence, and in every situation, in which he can be placed, may be preserved, improved, and perfected. The celestial as well as the terrestrial world knows its exalted but prescribed course. This angels and the spirits of the just, made perfect, do "clearly behold, and without any swerving observe."

Let humble reverence attend us as we proceed. The great and incomprehensible Author, and Preserver, and Ruler of all things—he himself works not without an eternal decree.

Such—and so universal is law. "Her seat," to use the sublime language of the excellent Hooker,[t] "is the bosom of God; her voice, the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power. Angels and men, creatures of every condition, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

Before we descend to the consideration of the several kinds and parts of this science, so dignified and so diversified, it will be proper, and it will be useful, to contemplate it in one general and comprehensive view; and to select some of its leading and luminous properties, which will serve to guide and enlighten us in that long and arduous journey, which we now undertake.

It may, perhaps, be expected, that I should begin with a regular definition of law. I am not insensible of the use, but, at the same time, I am not insensible of the abuse of definitions. In their very nature, they are not calculated to extend the acquisition of knowledge, though they may be well fitted to ascertain and guard the limits of that knowledge, which is already acquired. By definitions, if made with accuracy—and consummate accuracy ought to be their indispensable characteristick

[t] Hooker 34.

—ambiguities in expression, and different meanings of the same term, the most plentiful sources of errour and of fallacy in the reasoning art, may be prevented; or, if that cannot be done, may be detected. But, on the other hand, they may be carried too far, and, unless restrained by the severest discipline, they may produce much confusion and mischief in the very stations, which they are placed to defend.

You have heard much of the celebrated distribution of things into genera and species. On that distribution, Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths, than were before invented or perfected by any other philosopher. The axiom, from which he sets out, and in which the whole terminates, is, that whatever is predicated of a genus, may be predicated of every species contained under that genus, and of every individual contained under every such species.[u] On that distribution likewise, the very essence of scientifick definition depends: for a definition, strictly and logically regular, "must express the genus of the thing defined, and the specifick difference, by which that thing is distinguished from every other species belonging to that genus."[v]

From this definition of a definition—if I may be pardoned for the apparent play upon the word—it evidently appears that nothing can be defined, which does not denote a species; because that only, which denotes a species, can have a specifick difference.

[u] 1. Gill. (4to.) 690. [v] Reid's Ess. Int. 10. 11.

But further: a specifick difference may, in fact, exist; and yet language may furnish us with no words to express it. Blue is a species of colour; but how shall we express the specifick difference, by which blue is distinguished from green?

Again: expressions, which signify things simple, and void of all composition, are, from the very force of the terms, unsusceptible of definition. It was one of the capital defects of Aristotle's philosophy, that he attempted and pretended to define the simplest things.

Here it may be worth while to note a difference between our own abstract notions, and objects of nature. The former are the productions of our own minds; we can therefore define and divide them, and distinctly designate their limits. But the latter run so much into one another, and their essences, which discriminate them, are so subtile and latent, that it is always difficult, often impossible, to define or divide them with the necessary precision. We are in danger of circumscribing nature within the bounds of our own notions, formed, frequently, on a partial or defective view of the object before us. Fettered thus at our outset, we are restrained in our progress, and govern the course of our inquiries, not by the extent or variety of our subject, but by our own preconceived apprehensions concerning it.

This distinction between the objects of nature and our own abstract notions suggests a practical inference. Definitions and divisions in municipal law, the creature of man, may be more useful, because more adequate and more correct, than in natural objects.

By some philosophers, definition and division are considered as the two great nerves of science. But unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of a first principle, will spread confusion, distraction, and contradictions over the remotest parts of the most extended system.

Errours in science, as well as in life, proceed more frequently from wrong principles, than from ill drawn consequences. *Prava regula prima* may be the parent of the most fatal enormities.

The higher an edifice is raised, the more compactly it is built, the more precisely it is carried up in a just direction—in proportion to all these excellencies, a rent in the foundation will increase and become dangerous.

The case is the same with a radical errour at the foundation of a system. The more accurately and the more ingeniously men reason, and the farther they pursue their reasonings, from false principles, the more numerous and the more inveterate will their inconsistencies, nay, their absurdities be. One advantage, however, will result—those absurdities and those inconsistencies will be more easily traced to their proper source. When the string of a musical instrument has a fault only in one place, you know immediately how and where to find and correct it.

Influenced by these admonitory truths, I hesitate, at present, to give a definition of law. My hesitation is

increased by the fate of the far greatest number of those, who have hitherto attempted it. Many, as it is natural to suppose, and laboured have been the efforts to infold law within this scientifick circle; but little satisfaction—little instruction has been the result. Almost every writer, sensible of the defects, the inaccuracies, or the improprieties of the definitions that have gone before him, has endeavoured to supply their place with something, in his own opinion, more proper, more accurate, and more complete. He has been treated by his successours, as his predecessors have been treated by him: and his definition has had only the effect of adding one more to the lengthy languid list. This I know, because I have taken the trouble to read them in great numbers; but because I have taken the trouble to read them, I will spare you the trouble of hearing them—at least, the greatest part of them.

Some of them, indeed, have a claim to attention: one, in particular, will demand it, for reasons striking and powerful—I mean that given by the Commentator on the laws of England.

Let us proceed carefully, patiently, and minutely to examine it. If I am not deceived, the examination will richly compensate all the time, and trouble, and investigation, that will be allotted to it; for it will be uncommonly fruitful in the principles, and in the consequences of the great truths and important disquisitions, which it will lead in review before us.

"Law," says he, "in its most general and comprehensive sense, signifies a rule of action."[w] In its proper

[w] 1. Bl. Com. 38.

signification, a rule is an instrument, by which a right line—the shortest and truest of all—may be drawn from one point to another. In its moral or figurative sense, it denotes a principle or power, that directs a man surely and concisely to attain the end, which he proposes.

Law is called a rule, in order to distinguish it from a[x] sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law.

Again; law is called a rule, to denote that it carries along with it a power and principle of obligation. Concerning the nature and the cause of obligation, much ingenious disputation has been held by philosophers and writers on jurisprudence. Indeed the sentiments entertained concerning it have been so various, that an account of them would, in the estimation of my Lord Kaims, be a "delicate historical morsel."

This interesting subject will claim and obtain our attention, next after what we have to say concerning law in general.

When we speak of a rule with regard to human conduct, we imply two things. 1. That we are susceptible of direction. 2. That, in our conduct, we propose an end. The brute creation act not from design. They eat, they drink, they retreat from the inclemencies of the weather, without considering what their actions will ultimately produce. But we have faculties, which enable us to trace the connexion between actions and their effects; and our actions are nothing else but the steps

[x] 1. Bl. Com. 44.

which we take, or the means which we employ, to carry into execution the effects which we intend.

Hooker, I think, conveys a fuller and stronger conception of law, when he tells us, that "it assigns unto each thing the kind, that it moderates the force and power, that it appoints the form and measure of working."[y] Not the direction merely, but the kind also, the energy, and the proportion of actions is suggested in this description.

Some are of opinion, that law should be defined[z] "a rule of acting or not acting;" because actions may be forbidden as well as commanded. But the same excellent writer, whom I have just now cited, gives a very proper answer to this opinion, and shows the addition to be unnecessary, by finely pursuing the metaphor, which we have already mentioned. "We must not suppose that there needeth one rule to know the good, and another to know the evil by. For he that knoweth what is straight, doth even thereby discern what is crooked. Goodness in actions is like unto straightness; wherefore that which is well done, we term right."[a]

After this dry description of the literal and metaphorical meaning of a rule, permit me to relax your strained attention by a critical remark. In the philosophy of the human mind, it is impossible altogether to avoid metaphorical expressions. Our first and most familiar notions are suggested by material objects; and we cannot speak intelligibly of those that are immaterial, without continual allusions to matter and the qualities of matter.

[y] Hooker 2. [z] Daws. Orig. Laws, 4. 14. [a] Hooker 11.

Besides, in teaching moral science, the use of metaphors is not only necessary, but, if prudent, and honest, and guarded, it is highly advantageous. Nature has endowed us with the faculty of imagination, that we may be enabled to throw warming as well as enlightening rays upon truth—to embellish, to recommend, and to enforce it. Truth may, indeed, by reasoning, be rendered evident to the understanding; but it cannot reach the heart, unless by means of the imagination. To the imagination metaphors are addressed.

From this short excursion into the field of criticism, let us return to our legal tract. Law is a rule "prescribed." A simple resolution, confined within the bosom of the legislator, without being notified, in some fit manner, to those for whose conduct it is to form a rule, can never, with propriety, be termed a law.

There are many ways by which laws may be made sufficiently known. They may be printed and published. Written copies of them may be deposited in publick libraries, or other places, where every one interested may have an opportunity of perusing them. They may be proclaimed in general meetings of the people. The knowledge of them may be disseminated by long and universal practice. "Confirmed custom," says a writer on Roman jurisprudence, "is deservedly considered as a law. For since written laws bind us for no other reason than because they are received by the judgment of the people; those laws, which the people have approved, without writing, are also justly obligatory on all. For where is the difference, whether the people declare

their will by their suffrage, or by their conduct? This kind of law is said to be established by [b]manners."[c]

Of all yet suggested, the mode for the promulgation of human laws by custom seems the most significant, and the most effectual. It involves in it internal evidence, of the strongest kind, that the law has been introduced by common *consent;* and that this consent rests upon the most solid basis—experience as well as opinion. This mode of promulgation points to the strongest characteristick of liberty, as well as of law. For a consent thus practically given, must have been given in the freest and most unbiassed manner.

With pleasure you anticipate the prospect of a species of law, to which these remarks have already directed your attention. If it were asked—and it would be no improper question—who of all the makers and teachers of law have formed and drawn after them the most, the best, and the most willing disciples; it might be not untruly answered—custom.

Laws may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner, they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.

[b] D. l. 1. t. 3. 32. p. 1.

[c] The first written laws in Greece were given only six centuries before the christian era.—1. Gill. 7. (4to.)

If a simple resolution cannot have the force of a law before it be promulgated; we may certainly hazard the position—that it cannot have the force of a law, before it be made: in other words, that *ex post facto* instruments, claiming the title and character of laws, are impostors.

Peculiarly striking, upon this subject, are the sentiments of the criminal and unfortunate Strafford. I call him criminal, because he acted; I call him unfortunate, because he suffered, against the laws of his country. His sentiments must make a deep impression upon others; because, when he spoke them, he must have been deeply impressed with them himself. When he spoke them, he stood under a bill of attainder, suspended only by the slender thread of political justice, and ready, like the sword of Damocles, to fall on his devoted head. "Do we not live by laws? And must we be punished by laws before they are made? Far better were it to live by no laws at all, than to put this necessity of divination upon a man, and to accuse him of the breach of a law, before it be a law at all."[d]

In criminal jurisprudence, a Janus statute, with one face looking backward, and another looking forward, is a monster indeed.

The definition of law in the Commentaries proceeds in this manner. "Law is that rule of action, which is prescribed by some superiour, and which the inferiour is bound to obey." A superiour! Let us make a solemn pause—Can there be *no* law without a superiour? Is it *essential* to law, that inferiority should be involved in

[d] Whitlocke 230.

the obligation to obey it? Are these distinctions at the root of *all* legislation?

There is a law, indeed, which flows from the Supreme of being—a law, more distinguished by the goodness, than by the power of its allgracious Author. But there are laws also that are human; and does it follow, that, in these, a character of superiority is inseparably attached to him, who makes them; and that a character of inferiority is, in the same manner, inseparably attached to him, for whom they are made? What is this superiority? Who is this superiour? By whom is he constituted? Whence is his superiority derived? Does it flow from a source that is human? Or does it flow from a source that is divine?

From a human source it cannot flow; for no stream issuing from thence can rise higher than the fountain.

If the prince, who makes laws for a people, is superiour, in the terms of the definition, to the people, who are to obey; how comes he to be vested with the superiority over them?

If I mistake not, this notion of superiority, which is introduced as an *essential* part in the definition of a law—for we are told that a law *always*[c] supposes some superiour, who is to make it—this notion of superiority contains the germ of the divine right—a prerogative impiously attempted to be established—of princes, arbitrarily to rule; and of the corresponding obligation—a servitude tyrannically attempted to be imposed—on the people, implicitly to obey.

[c] 1. Bl. Com. 43.

Despotism, by an artful use of "superiority" in politicks; and scepticism, by an artful use of "ideas" in metaphysicks, have endeavoured—and their endeavours have frequently been attended with too much success—to destroy all true liberty and sound philosophy. By their baneful effects, the science of man and the science of government have been poisoned to their very fountains. But those destroyers of others have met, or must meet, with their own destruction.

We now see, how necessary it is to lay the foundations of knowledge deep and solid. If we wish to build upon the foundations laid by another, we see how necessary it is cautiously and minutely to examine them. If they are unsound, we see how necessary it is to remove them, however venerable they may have become by reputation; whatever regard may have been diffused over them by those who laid them, by those who built on them, and by those who have supported them.

But was Sir William Blackstone a votary of despotick power? I am far from asserting that he was. I am equally far from believing that Mr. Locke was a friend to infidelity. But yet it is unquestionable, that the writings of Mr. Locke have facilitated the progress, and have given strength to the effects of scepticism.

The high reputation, which he deservedly acquired for his enlightened attachment to the mild and tolerating doctrines of christianity, secured to him the esteem and confidence of those, who were its friends. The same high and deserved reputation inspired others of very different views and characters, with a design to avail themselves of its splendour, and, by that means, to

diffuse a fascinating kind of lustre over their own tenets of a dark and sable hue. The consequence has been, that the writings of Mr. Locke, one of the most able, most sincere, and most amiable assertors of christianity and true philosophy, have been perverted to purposes, which he would have deprecated and prevented, had he discovered or foreseen them.

Berkeley, the celebrated bishop of Cloyne, wrote his Principles of human Knowledge—a book intended to disprove the existence of matter—with the express view of banishing scepticism both from science and from religion. He was even sanguine in his expectations of success. But the event has proved that he was egregiously mistaken; for it is evident, from the use to which later authors have applied it, that his system leads directly to universal scepticism.

Similar, though in an inferiour degree, have been, and may be, the fate and the influence of the writings and character of Sir William Blackstone; even admitting that he was as much a friend to liberty, as Locke and Berkeley were friends to religion.

But in prosecuting the study of law on liberal principles and with generous views, our business is much less with the character of the Commentaries or of their author, than with the doctrines which they contain. If the doctrines, insinuated in the definition of law, can be supported on the principles of reason and science; the defence of other principles, which I have thought to be those of liberty and just government, becomes—I am sorry to say it—a fruitless attempt.

Sir William Blackstone, however, was not the first, nor has he been the last, who has defined law upon the same principles, or upon principles similar and equally dangerous.

This subject is of such radical importance, that it will be well worth while to trace it as far as our materials can carry us; for errour as well as truth should be examined historically, and pursued back to its original springs.

By comparing what is said in the Commentaries on this subject, with what is mentioned concerning it in the system of morality, jurisprudence, and politicks written by Baron Puffendorff, we shall be satisfied that, from the sentiments and opinions delivered in the last mentioned performance, those in the first mentioned one have been taken and adopted. "A law," says Puffendorff, "is the command of a superiour."[f] "A law," says Sir William Blackstone, "always supposes some superiour, who is to make it."[g]

The introduction of superiority, as a necessary part of the definition of law, is traced from Sir William Blackstone to Puffendorff. This definition of Puffendorff is substantially the same with that of Hobbes. "A law is the command of him or them, that have the sovereign power, given to those that be his or their subjects."[h] It is substantially the same also with that of Bishop Saunderson. "Law is a rule of action, imposed on a subject, by one who has power over him."[i]

[f] Puff. B. 1. c. 2. s. 6. p. 16. B. 1. c. 6. s. 1. 2. p. 56. 57.

[g] 1. Bl. Com. 43. [h] 3. Dagge 95. 96. [i] Daws. Orig. L. 3. cites Saund. Prel. 5. s. 3.

Let us now inquire what is meant by superiority, that we may be able to ascertain and recognise those qualities, inherent or derivative, which entitle the superiour or sovereign to the transcendent power of imposing laws.

We can distinguish two kinds of superiority. 1. A superiority merely of power. 2. A superiority of power, accompanied with a right to exercise that power. Is the first sufficient to entitle its possessor to the character and office of a legislator? If we subscribe to the doctrines of Mr. Hobbes, we shall say, that it is. "To those," says he, "whose power is irresistible, the dominion of all men adhereth naturally, by their excellence of power." [k]

This position, strange as it is, has had its advocates in ancient as well as in modern times. Even the accomplished Athenians, who excluded it from their municipal code, seem to have considered it as part of the received law of nations. "We follow," says their ambassadour in the name of his commonwealth, "the common nature and genius of mankind, which appoints those to be masters, who are superiour in strength. We have not made this law; nor are we the first, who have appealed to it. We received it from antiquity: we are determined to transmit it to the most distant futurity: and we claim and use it in our own case." [l]

Brennus, at the head of his victorious and ferocious Gauls, with more conciseness, and with a less striking

[k] De Cive 187. (Puff. 64.) [l] Puff. 65. (Thucyd. l. 5. c. 105) 1. Anac. 351.

inconsistency of character, tells the vanquished Romans "omnia fortium esse."[m] Every thing belongs to the bold and the strong.

The prudent Plutarch thinks it "the first and principal law of nature, that he whose circumstances require protection and deliverance, should admit him for his ruler, who is able to protect and deliver him."[n]

For us, it is sufficient, as men, as citizens, and as states, to say, that power is nothing more than the right of the strongest, and may be opposed by the same right, by the same means, and by the same principles, which are employed to establish it. Bare force, far from producing an obligation to obey, produces an obligation to resist.

Others, unwilling to rest the office of legislation and the right of sovereignty simply on superiority of power, have to this quality superadded preeminence or superiour excellence of nature.

Let it be remembered all along, that I am examining the doctrine of superiority, as applied to human laws, the proper and immediate object of investigation in these lectures. Of the law that is divine, we shall have occasion, at another time, to speak, with the reverence and gratitude which become us.

"It is a law of nature," says Dionysius of Halicarnassus, "common to all men, and which no time shall disannul or destroy, that those, who have more

[m] Puff. 65. (Livy.) [n] Puff. 65. (Plut. in Pelop.)

strength and *excellence*, shall bear rule over those, who have less."[o] The favourers of this opinion are unfortunate, both in the illustrations, by which they attempt to evince it; and in the inferences, to which they contend it gives rise.

Because Cicero, by a beautiful metaphor, describes the government of the other powers of the mind as assigned, by nature, to the understanding; does it follow that, in strict propriety of reasoning, the right of legislation is annexed, without any assignment, to superiour excellence?

Aristotle, it seems, has said, that if a man *could* be found, excelling in *all* virtues, such an one would have a *fair title* to be king. These words may well be understood as conveying, and probably were intended to convey, only this unquestionable truth—that excellence in every virtue furnished the strongest recommendation, in favour of its happy possessor, *to be elected* for the exercise of authority. If so, the opinion of Aristotle is urged without a foundation properly laid in the fact.

But let us suppose the contrary: let us suppose it to be the judgment of Aristotle, that the person, whom he characterizes, derived his right to the exercise of power, not from the donation made to him by a voluntary election, but solely from his superiour talents and excellence; shall the judgment of Aristotle supersede inquiry into its reasonableness? Shall the judgment of Aristotle, if found, on inquiry, to be unreasonable, silence all reprehension or confutation? Decent respect for authority is

[o] Puff. 65. (Dion. Hal. b. 1. c. 5.)

favourable to science. Implicit confidence is its bane. Let us adopt—for it is necessary, in the cause of truth and freedom, that we should adopt—the manly expostulation, which the ardent pursuit of knowledge drew from the great Bacon—" Why should a few received authors stand up like Hercules's columns, beyond which there should be no sailing or discovery?"

To Aristotle, more than to any other writer, either ancient or modern, this expostulation is strictly applicable. Hear what the learned Grotius says on this subject. " Among philosophers, Aristotle deservedly holds the chief place, whether you consider his method of treating subjects, or the acuteness of his distinctions, or the weight of his reasons. I could only wish that the authority of this great man had not, for some ages past, degenerated into tyranny; so that truth, for the discovery of which Aristotle took so great pains, is now oppressed by nothing more than by the very name of Aristotle."[p]

Guided and supported by the sentiments and by the conduct of Grotius and Bacon, let us proceed, with freedom and candour combined, to examine the judgment—though I am very doubtful whether it was the judgment—of Aristotle, that the right of sovereignty is founded on superiour excellence.

To that superiority, which attaches the right to command, there must be a corresponding inferiority, which imposes the obligation to obey. Does this right and this obligation result from every kind and every degree of superiority in one, and from every kind and every

[p] Gro. Prel. 28.

degree of inferiority in another? How is excellence to be rated or ascertained?

Let us suppose three persons in three different grades of excellence. Is he in the lowest to receive the law immediately from him in the highest? Is he in the highest to give the law immediately to him in the lowest grade? Or is there to be a gradation of law as well as of excellence? Is the command of the first to the third to be conveyed through the medium of the second? Is the obedience of the third to be paid, through the same medium, to the first? Augment the number of grades, and you multiply the confusion of their intricate and endless consequences.

Is this a foundation sufficient for supporting the solid and durable superstructure of law? Shall this foundation, insufficient as it is, be laid in the contingency—allowed to be improbable, not asserted to be even possible—"if a man can be found, excelling in *all* virtues?"

Had it been the intention of Providence, that some men should govern the rest, without their consent, we should have seen as indisputable marks distinguishing these superiours from those placed under them, as those which distinguish men from the brutes. The remark of Rumbald, in the nonresistance time of Charles the second, evinced propriety as well as wit. He could not conceive that the Almighty intended, that the greatest part of mankind should come into the world with saddles on their backs and bridles in their mouths, and that a few should come ready booted and spurred to ride the rest

to death.[q] Still more apposite to our purpose is the saying of him, who declared that he would never subscribe the doctrine of the divine right of princes, till he beheld subjects born with bunches on their backs, like camels, and kings with combs on their heads, like cocks; from which striking marks it might indeed be collected, that the former were designed to labour and to suffer, and the latter, to strut and to crow.[r]

These pretensions to superiority, when viewed from the proper point of sight, appear, indeed, absurd and ridiculous. But these pretensions, absurd and ridiculous as they are, when rounded and gilded by flattery, and swallowed by pride, have become, in the breasts of princes, a deadly poison to their own virtues, and to the happiness of their unfortunate subjects. Those, who have been bred to be kings, have generally, by the prostituted views of their courtiers and instructors, been taught to esteem themselves a distinct and superiour species among men, in the same manner as men are a distinct and superiour species among animals.

Lewis the fourteenth was a strong instance of the effect of that inverted manner of teaching and thinking, which forms kings to be tyrants, without knowing or even suspecting that they are so. That oppression, under which he held his subjects, during the whole course of his long reign, proceeded chiefly from the principles and habits of his erroneous education. By this, he had been accustomed to consider his kingdom as his patrimony, and his power over his subjects as his rightful and undelegated inheritance. These sentiments

[q] 1. Burgh. Pol. Dis. 3. [r] Boling. Rem. 209.

were so deeply and strongly imprinted on his mind, that when one of his ministers represented to him the miserable condition to which those subjects were reduced, and, in the course of his representation, frequently used the word "l'etat," the state; the king, though he felt the truth, and approved the substance of all that was said, yet was shocked at the frequent repetition of the word "l'etat," and complained of it as an indecency offered to his person and character.

And, indeed, that kings should imagine themselves the final causes, for which men were made, and societies were formed, and governments were instituted, will cease to be a matter of wonder or surprise, when we find that lawyers, and statesmen, and philosophers have taught or favoured principles, which necessarily lead to the same conclusions.

Barbeyrac, whose commentaries enrich the performances of the most distinguished philosophers, at one time, taught and favoured principles, which necessarily led to the conclusions, so degrading and so destructive to the human race. On this subject, it will be worth while to pursue his train of thought.

In the formation of societies and civil governments, three different conventions or agreements are supposed, by Puffendorff and many other writers, to have taken place. The first convention is an engagement, by those who compose the society or state, to associate together in one body; and to regulate, with one common consent, whatever regards their preservation, their security, their improvement, and their happiness. The second convention is, to specify the form of government, that shall

be established among them. The third convention is an engagement between the following parties; that is to say, the person or persons, on whom the sovereignty, or superiority, or majesty—for it is called by all these names—is conferred, on one hand; and, on the other hand, those who have conferred this sovereignty, this superiority, this majesty; and are now, by that step, as it seems, become subjects. By this third convention, the sovereign engages to consult the common security and advantage of the subjects; and the subjects engage to observe fidelity and allegiance to the sovereign. From this last convention, the state is supposed to receive its final completion and perfection.

This account of the origin of society and government will be fully considered afterwards. I introduce it now, in order to show the force and import of Barbeyrac's observation concerning it. "The first convention," says he, "is only, with regard to the second, what scaffolding is with regard to the building, for whose construction it was erected."[s]

And is it so? Is society nothing more than a scaffolding, by the means of which government may be erected; and which, consequently, may be prostrated, as soon as the edifice of civil government is built? If this is so, it must have required but a small portion of courtly ingenuity to persuade Lewis the fourteenth, that, in a monarchy, government was nothing but a scaffolding for the king.

For the honour of Barbeyrac, however, let not this account be concluded, till it be told, that this did not

[s] Puff. 641. note to b. 7. c. 2. s. 8.

continue to be always his sentiment; that, on consideration and reflection, this sentiment was changed; and that, when it was changed, he, as every other great and good man will do on similar occasions, freely and nobly retracted it. But although it has been retracted by Barbeyrac, it has neither been retracted nor abandoned by some others.

To evince that I speak not without foundation, and to show, what will not be suspected till they are shown, the extravagant notions which have been entertained on this head, I will adduce a number of sentences and quotations, which Grotius[t] has collected together, in order to combat the sentiments of those, who hold that the supreme power is, always and without exception, in the people.

Historians and philosophers, poets and princes, bishops and fathers, are all summoned to oppose the dangerous doctrine.

When Tacitus says, "that, as we must bear with storms, barrenness, and the inconveniences of nature, so we must bear with the luxury or avarice of princes;" Grotius tells us, "'tis admirably said." Marcus Antoninus, the philosopher, is produced as an authority, "that magistrates are to judge of private persons, princes of magistrates, but God alone of princes." King Vitigis declares, that "what regards the royal power is to be judged by the powers above; because it is derived from heaven, and is accountable to heaven alone." Ireneus, we are informed, says excellently, "by whose orders men are born, by his command kings are ordained."

[t] Grotius 68—71.

The same doctrine is contained in the constitutions of Clement. "You shall fear the king, knowing that he is chosen of God."

In a tragedy of Æschylus, the suppliants use this language to the king. "Sir, you are the city and the publick; you are an independent judge. Seated upon your throne as upon an altar, you alone govern all by your absolute commands."

Here we have the very archetype of the idea of Lewis the fourteenth, sanctioned by the name of Grotius. If the king was the city and the publick; to mention "l'etat" in his presence, as something separate and distinct, was certainly an indecency; because it contained an implied though distant limitation of his power.

The reverend bishop of Tours addresses the king of France in this very remarkable manner: "If any of us, O king! should transgress the bounds of justice, he may be punished by you: but if you yourself should offend, who shall call you to account? When we make representations to you, if you please, you hear us: but if you will not, who shall condemn you? There is none but he, who has declared himself to be justice itself."

Let me also mention what Heineccius says, in much more recent times, in his System of Universal Law. "The doctrine,[u] which makes the people superiour to the king or prince, and places in the former the real, and in the latter only personal majesty, is a most petulant one. It is the doctrine of Hottoman, Sidney, Milton,

[u] 2. Hein. 120. 121.

and others. Since a people, when they unite into a republick, renounce their own will, and subject themselves to the will of another, with what front can they call themselves superiour to their sovereign?"

And yet Heineccius himself allows, that "Grotius (1. 3. 8.) is thought by not a few, to have given some handle to the doctrine of passive obedience and non-resistance."

Indeed, the lawyers of almost all the states of Europe represent kings as legislators: and we know, that, in the dictionaries of many, legislative and unlimited power are synonimous terms. To unlimited power, the correlative is passive obedience.

Even Baron de Wolfius, the late celebrated philosopher of Hall, lays down propositions concerning patrimonial kingdoms, without rejecting or contradicting a distinction, so injurious to the freedom and the rights of men.

Domat, in his book on the civil law, derives the power of governours from *divine* authority. "It is always he (God) who places them in the seat of authority: it is from him alone that they derive all the power and authority that they have; and it is the ministry of his justice that is committed to them. And seeing it is God himself whom they represent, in the rank which raises them above others; he will have them to be considered as holding his place in their functions. And it is for this reason, that he himself gives the name of gods to those,

to whom he communicates the right of governing and judging men."[v]

To diminish the force of the foregoing citations, it may be said, that, in all probability, Lewis the fourteenth—and the same may be said of other princes equally ignorant—never read the tragedies of Æschylus, nor the history of Gregory of Tours. It is highly probable that he never did: but it is equally probable, that their sentiments were known in his court, and found the way, through the channels of flattery, to the royal ear. But the writings of Grotius must have been well known in France, and probably to Lewis the fourteenth himself. This very book of the Rights of War and Peace was dedicated to his father, Lewis the thirteenth; and its author, we are told, had credit with some of the ministers of that prince.

Every plausible notion in favour of arbitrary power, appearing in a respectable dress, and introduced by an influential patron, is received with eagerness, protected with vigilance, and diffused with solicitude, by an arbitrary government. The consequence is, that, in such a government, political prejudices are last of all, if ever, overcome or eradicated.

But these doctrines, it may be replied, are not now believed, even in France. But they have been believed—they have been believed, even in France, to the slavery and misery of millions. And if, happily, they are not still believed there; unfortunately, they are still believed in other countries.

[v] 1. Domat XXII.

But I ask—why should they be believed at all? I ask further: if they are not, and ought not to be believed; why is their principle suffered to lie latent and lurking at the root of the science of law? Why is that principle continued a part of the very definition of law?

The pestilent seed may seem, at present, to have lost its vegetating power: but an unfriendly season and a rank soil may still revive it. It ought to be finally extirpated. It has, even within our own remembrance, done much real mischief. The position, that law is inseparably attached to superiour power, was the political weapon used, with the greatest force and the greatest skill, in favour of the despotick claims of Great Britain over the American colonies. Of this, the most striking proofs will appear hereafter. Let me, at present, adopt the sentiments expressed, on a similar subject, by Vattel. "If the base flatterers of despotick power rise up against my principles; I shall have, on my side, the friend of laws, the true citizen, and the virtuous man." [w]

Let us conclude our observations upon this hypothesis concerning the origin of sovereignty, by suggesting, that were it as solid as it is unsound in speculation, it would be wholly visionary and useless in practice. Where would minions and courtly flatterers find the objects, to which they could, even with courtly decency, ascribe superiour talents, superiour virtue, or a superiour nature, so as to entitle them, even on their own principles, to legislation and government?

We have now examined the inherent qualities, which have been alleged as sufficient to entitle, to the right and

[w] Vattel Pref. 14.

office of legislation, the superiour, whose interposition is considered as essential to a law. We have weighed them in the balance, and we have found them wanting.

If this superiour cannot rest a title on any inherent qualities; the qualities, which constitute his title, if any title he has, must be such as are derivative. If derivative; they must be derived either from a source that is human, or from a source that is divine. "Over a whole grand multitude," says the judicious [x] Hooker, "consisting of many families, impossible it is, that any should have complete lawful power, but by consent of men, or by immediate appointment of God." We will consider those sources separately.

How is this superiour constituted by *human* authority? How far does his superiority extend? Over whom is it exercised? Can any person or power, appointed by human authority, be superiour to those by whom he is appointed, and so form a necessary and essential part in the definition of a law?

On these questions, a profound, I will not say a suspicious silence is observed. By the Author of the Commentaries, this superiour is announced in a very questionable shape. We can neither tell who he is, nor whence he comes. "When society is once formed, government results of course"—I use the words [y] of the Commentary—"as necessary to preserve and to keep that society in order. Unless some superiour be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state

[x] Hooker. b. i. s. 10. p. 18. [y] 1. Bl. Com. 48.

of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But as all the members of the society are naturally equal, it may be asked"—what question may be asked? The most natural question, that occurs to me, is—how is this superiour, without whom there can be no law, without whom there can be no judge upon earth—how is this superiour to be constituted? This is the question, which, on this occasion, I would expect to see proposed; this is the question, to which I would expect to hear an answer. But how suddenly is the scene shifted! Instead of the awful insignia of superiority, to which our view was just now directed, the mild emblems of confidence make their appearance. The person announced was a dread superiour: but the person introduced is a humble trustee. For, to proceed, "it may be asked, in whose hands are the reins of government to be *intrusted*?"

I very well know how "a society once formed" constitute a trustee: but I am yet to learn, and the Commentator has not yet informed me, how this society can constitute their superiour. Locke somewhere says that "no one can confer more power on another, than he possesses himself."[z]

If the information, how a superiour is appointed, be given in any other part of the valuable Commentaries; it has escaped my notice, or my memory. Indeed it has been remarked by his successour in the chair of law, that Sir William Blackstone "declines speaking of the origin of government."[a]

[z] Lock. Gov. p. 2. s. 6. [a] El. Jur. 23.

The question recurs—how is this superiour constituted by human authority? Is he constituted by a law? If he is, that law, at least, must be made without a superiour; for by that law the superiour is constituted. If there can be no law without a superiour, then the institution of a superiour, by human authority, must be made in some other manner than by a law. In what other manner can human authority be exerted? Shall we say, that it may be exerted in a covenant or an engagement? Let us say, for we may say justly, that it may. Let us suppose the authority to be exerted, and the covenant or engagement to be made. Still the question recurs—can this authority so exerted, can this covenant or engagement so made, produce a superiour?

If he is now entitled to that appellation, he must be so by virtue of some thing, which he has received. But has he received more than was given? Could more be given than those, who gave it, possessed?

We can form clear conceptions of authority, original and derived, entire and divided into parts; but we have no clear conceptions how the parts can become greater than the whole; nor how authority, that is derived, can become superiour to that authority, from which the derivation is made.

If these observations are well founded; it will be difficult—perhaps we may say, impossible—to account for the institution of a superiour by human *authority*.

Is there any other human source, from which superiority can spring? 'Tis thought there is: 'tis thought that human *submission* can effectuate a purpose, for the

accomplishment of which human authority has been found to be unavailing.

And is it come to this! Must submission to an equal be the yoke, under which we must pass, before we can diffuse the mild power, or participate in the benign influence of law? If such is, indeed, our fate, let resignation be our aim: but before we resign ourselves, let us examine whether our fate be so hard.

That I may be able to convey a just and full representation of opinions, which have been entertained on this subject, I shall give an abstract of the manner, in which Puffendorff has reasoned concerning it, in his chapter on the generation of civil sovereignty.

His object is, "to examine whence that sovereignty or supreme command, which appears in every state, and which, as a kind of soul, informs, enlivens, and moves the publick body, is immediately produced."

In this inquiry, he supposes that civil authority requires natural strength and a title. "Both these requisites," says he, "immediately flow from those pacts, by which the state is united and subsists." With regard to the former—natural strength—he observes, "that since all the members of the state, in submitting their wills to the will of a single director; did, at the same time, thereby oblige themselves to nonresistance, or to obey him in all his desires and endeavours of applying their strength and wealth to the good of the publick; it appears that he, who holds the sovereign rule, is possessed of sufficient force to compel the discharge of the injunctions, which he lays."

"So, likewise," adds he, "the same covenant affords a full and easy title, by which the sovereignty appears to be established, not upon violence, but in a lawful manner, upon the voluntary consent and *subjection* of the respective members."

"This, then," continues he, "is the nearest and immediate cause, from which sovereign authority, as a moral quality, doth result. For if we suppose *submission* in one party, and, in another, the *acceptance* of that submission; there accrues, presently, to the latter, a right of imposing commands on the former; which is what we term sovereignty or rule. And as, by private contract, the right of any thing which we possess, so, by *submission*, the right to dispose of our strength and our liberty of acting, may be conveyed to another."

He illustrates this immediate cause of sovereign authority, by the following instance. "If any person should voluntarily and upon covenant deliver himself to me in servitude, he thereby really confers on me the power of a master." "Against which way of arguing, to object the vulgar maxim, *quod quis non habet, non potest in alterum transferre*,[b] is but a piece of trifling ignorance."[c]

[b] Puff. b. 7. c. 3. s. 1. p. 654. 655.

[c] All this, it is true, has been done, in fact. This act of legal suicide has been often perpetrated; and, in the history of some periods, we find the prescribed form, by which liberty was extinguished—a form truly congenial with the transaction—a form expressed in terms the most disgraceful to the dignity of man. "Licentiam habeatis, mihi qualemcunque volueritis disciplinam ponere, vel venumdare, aut quod vobis placuerit de me facere." (6. Gibbon

Shall we, for a moment, suppose all this to be done? What is left to the people? Nothing. What are they? Slaves. What will be their portion? That of the beasts —instinct, compliance, and punishment. So true it is, that in the attempt to make one person more than man, millions must be made less.

We now see the price, at which law must be purchased; for we see the terms, on which a superiour, of such absolute necessity to a law, is constituted, according to the hypothesis, of which I have given an account. We see the covenants which must be entered into, the consent which must be given, the submission which must be made, the subjection which must be undergone, the state, analogous to servitude, which must be supposed, before this system of superiority can be completed. Has this been always done—must this be always done, in every state, where law is known or felt?

Without examining its incongruity with reason, with freedom, and with fact; without insisting on the incoherence of the parts, and the unsoundness of the whole, I shall, again, for a moment, take it all for granted: and, on that supposition, I shall put the question—Is even all this sufficient to constitute a superiour? Is it in the power of the meanest to prostitute, any more than it is in the power of the greatest to delegate, what he does not

361. cites Marculf. Formul.) But these periods were the periods which introduced and established the feudal law. "The majesty of the Roman law protected the liberty of the citizen against his own distress or despair." 6. Gibbon. 360.

possess?[d] The arguments, therefore, which we used with regard to the appointment of a superiour by human authority, will equally apply to his appointment by human submission. The manner may be different: the result will be the same.

Indeed, the author of this system betrays a secret consciousness, that it is too weak and too disjointed to stand without an extrinsick support. "Yet still," says he, "to procure to the supreme command an especial efficacy, and a sacred respect, there is need of another additional principle, besides the submission of the subjects. And therefore he who affirms sovereignty to result immediately from compact, doth not, in the least, detract from the *sacred* character of civil government; or maintain that princes bear rule, by human right *only*, and not by divine."[e]

It deserves remark, that, in this passage, Puffendorff assumes the divine right of princes to bear rule, as an admitted principle; and seems only solicitous to show, that the account, which he has given, of the origin of sovereignty, is not inconsistent with their sacred character.

[d] Let individuals, in any number whatever, become severally and successively subject to one man, they are all, in that case, nothing more than master and slaves; they are not a people governed by their chief; they are an aggregate, if you will; but they do not form an association; there subsists among them neither commonwealth nor body politick. Such a superiour, though he should become master of half the world, would be still a private person, and his interest, separate and distinct from that of his people, would be still no more than a private interest. Rousseau's Orig. Comp. 17. 18.

[e] Puff. 655. b. 7. c. 3. s. 1.—2. Burl. 39.

After some further observations with regard to the source of government and the cause of sovereignty, the author acknowledges, that there is very little difference between his sentiments on the subject, and those of Bœcler. What Bœcler's sentiments were, we learn from the account given of them by our author. "The supreme authority,"[f] says Bœcler, "is not to be derived from the bare act of man, but from the command of God, and from the law of nature; or from such an act of men, by which the law of nature was followed and obeyed."

So far Puffendorff seems willing to go. He adopts a kind of compromising principle. He founds the right of the sovereign immediately upon the submission of the subjects; but, to complete the efficacy of supreme command, he calls in the aid of an additional principle, the sacred character of civil government, and the divine right of princes to bear rule. Further he was unwilling to proceed.

It has been often the fate of a compromise between two parties, that it has given entire satisfaction to neither. Such has been the fate of that adopted by Puffendorff. Some will certainly think, that he has given too much countenance to the claim, which princes have boldly made, of a divine right to rule. Others have thought, that, into his composition of a sovereign, he has infused too great a proportion of human authority. They pursue the source of sovereignty further than he is willing to accompany them, and maintain, that it is the Supreme Being, who confers immediately the supreme power on princes, without the intervention or concurrence of man.

[f] Puff. 655. b. 7. c. 3. s. 1.

This doctrine, in some countries, and at some periods, has been carried, and is still carried, to a very extravagant height, and has been supported and propagated, and still is supported and propagated, with uncommon zeal. It has been, and still is, a favourite at courts; and has been, and still is, treated with every appearance of profound respect by courtiers, and, in too many instances, by philosophers and by statesmen, who have imitated, and still imitate courtiers in their practice of the slavish art. In the reign of James the second, "the immediate emanation of divine authority" was introduced on every occasion, and ingrafted, often with the strangest impropriety, on every subject. Even in the present century, a book has been burnt by the hangman, because its author maintained, "that God is not the immediate cause of sovereignty."[g]

It cannot escape observation, that, in one particular, those who carry this doctrine the furthest, seem to challenge, with some success, the palm of consistency from those, who refuse to accompany them. Both entertain the same sentiments—and they are certainly overcharged ones—concerning sovereignty and superiority. Thus far they march together. But here, one division halt. The other proceed, and, looking back on those behind them, demand, why, having gone so far, they refuse to accomplish the journey. They insist, that all human causes are inadequate to the production of that superiority or sovereignty, about the august and sacred character of which they are both agreed. They say, that neither particular men, nor a multitude of men, are themselves possessed of this sovereignty or superiority; and that, therefore, they cannot confer it on the prince.

[g] Puff. 656. note to b. 7. c. 3. s. 3.

The consequence is, that, as this superiority is admitted to exist, and as it cannot be conferred by men, it must derive its origin from a higher source.

It is in this manner that Domat reasons concerning the origin of sovereignty and government. "As there is none but God alone who is the natural sovereign of man; so it is likewise from him that they who govern derive all their power and authority. It is one of the ceremonies in the coronation of the kings of France, for them to take the sword from the altar; thereby to denote, that it is immediately from the hand of God that they derive the sovereign power, of which the sword is the principal emblem."[h]

In the same train of sentiment, Bishop Taylor[i] observes, "that the legislative or supreme power is not the servant of the people, but the minister, the trustee, and the representative of God: that all just human power is given from above, not from beneath; from God, not from the people."

Indeed, on the principle of superiority, Caligula's reasoning was concise and conclusive. "If I am only a man, my subjects are something less: if they are men, I am something more."[j]

The answer to the foregoing reasoning appears to me to be more ingenious than solid, and to be productive of amusement, rather than of conviction. I shall deliver it from Burlamaqui, who, on this subject, has followed the

[h] 2. Domat 298, 299. [i] Rule of Conscience 429.

[j] Rous. Or. Com 6.

opinions of Puffendorff. "This argument," says he, "proves nothing. It is true, that neither each member of the society, nor the whole multitude collected, are formally invested with the supreme authority; but it is sufficient that they possess it virtually; that is, that they have within themselves all that is necessary to enable them, by the concurrence of their free will and consent, to produce it in the sovereign. Since every individual has a natural right of disposing of his own natural freedom, according as he thinks proper; why should he not have a power of transferring to another, that right which he has of directing himself? Now is it not manifest, that, if all the members of the society agree to transfer this right to one of their fellow members, this cession will be the nearest and immediate cause of sovereignty? It is, therefore, evident, that there are, in each individual, the seeds, as it were, of the supreme power. The case is here very near the same, as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each."[k]

The metaphors from vegetation and musick may illustrate and please; but they cannot prove nor convince. The notion of virtual sovereignty is as unsatisfactory to me, on this occasion, as that of virtual representation has been, on many others. Indeed, I see but little difference between a claim to derive from another that, which he is willing to give, but of which he is not possessed, and a claim to derive from him that, which he possesses, but which he has not given, and will not give.

[k] 2. Burl. 41, 42.

Besides; let me repeat the questions, which I formerly put.—Have these degrading steps been always taken? must they be always taken, in every state, where law is known or felt? For let it not be forgotten, that superiority is introduced as a *necessary* part of the definition of law.

I will not attempt to paint the hideous consequences that have been drawn, nor the still more hideous practices that have claimed impunity, indulgence, and even sanction, from the pretended principle of the divine right of princes. Absolute, unlimited, and indefeasible power, nonresistance, passive obedience, tyranny, slavery, and misery walk in its train.

On this subject—its importance cannot be overrated—let us receive instruction from a well informed and a well experienced master—from one, who, probably, in some periods of his life, had felt what he so feelingly describes—from one, who had been bred to the trade of a prince, and who had been perfectly initiated in all the mysteries of the profession—from the late Frederick of Prussia.

"If my reflections," says he, "shall be fortunate enough to reach the ears of some princes, they will find among them certain truths, which they never would have heard from the lips of their courtiers and flatterers. Perhaps they will be struck with astonishment, to see such truths placed, by their side, on the throne. But it is time, that, at last, they should learn, that their false principles are the most empoisoned source—*la source la plus empoisonée*—of the calamities of Europe.

"Here is the errour of the greatest part of princes. They believe that God has expressly, and from a particular attention to their grandeur, their happiness, and their pride, formed their subjects for no other purpose, than to be the ministers and instruments of their unbridled passions. As the principle, from which they set out, is false; the consequences cannot be otherwise than infinitely pernicious. Hence the unregulated passion for false glory—hence the inflamed desire of conquest—hence the oppressions laid upon the people—hence the indolence and dissipation of princes—hence their ambition, their injustice, their inhumanity, their tyranny—hence, in short, all those vices, which degrade the nature of man.

"If they would disrobe themselves of these erroneous opinions; if they would ascend to the true origin of their appointment; they would see, that their elevation and rank, of which they are so jealous, are, indeed, nothing else than the work of the people; they would see, that the myriads of men, placed under their care, have not made themselves the slaves of one single man, with a view to render him more powerful and more formidable; have not submitted themselves to a fellow citizen, in order to become the sport of his fancies, and the martyrs of his caprice; but have chosen, from among themselves, the man, whom they believed to be the most just, that he might govern them; the best, that he might supply the place of a father; the most humane, that he might compassionate and relieve their misfortunes; the most valiant, that he might defend them against their enemies; the most wise, that he might not engage them inconsiderately in ruinous and destructive wars; in one word, the man the most proper to repre-

sent the body of the state, and in whom the sovereign power might become a bulwark to justice and to the laws, and not an engine, by the force of which tyranny might be exercised, and crimes might be committed with impunity.

"This principle being once established, princes would avoid the two rocks, which, in all ages, have produced the ruin of empires, and distraction in the political world—ungoverned ambition, and a listless inattention to affairs."[1] "They would often reflect that they are men, as well as the least of their subjects—that if they are the first judges, the first generals, the first financiers, the first ministers of society; they are so, for the purpose of fulfilling the duties, which those names import. They will reflect, that they are only the first servants of the state, bound to act with the same integrity, the same caution, and the same entire disinterestedness, as if, at every moment, they were to render an account of their administration to the citizens."[m]

I will not charge to the authors, whose opinions I have examined, all the consequences that have been drawn, practically as well as theoretically, from their principles. From their principles, however, admitted by themselves without due caution and scrutiny, those consequences have been drawn by others, and drawn too accurately and too successfully for the peace, liberty, and happiness of men.

After all, I am much inclined, for the honour of human nature, to believe, that all this doctrine concerning

[1] K. Prus. works. v. 6. p. 48. 50. [m] Id. p. 83. 84.

the divine right of kings was, at first, encouraged and cherished by many, from motives, mistaken certainly, but pardonable, and even laudable; and that it was intended not so much to introduce the tyranny of princes, as to form a barrier against the tyranny of priests.

One of them, at the head of a numerous, a formidable, and a well disciplined phalanx, claimed to be the Almighty's vicegerent upon earth; claimed the power of deposing kings, disposing crowns, releasing subjects from their allegiance, and overruling the whole transactions of the christian world. Superstition and ignorance dreaded, but could not oppose, the presumptuous claim. The Pope had obtained, what Archimedes wanted, *another* world, on which he placed his ecclesiastical machinery; and it was no wonder that he moved *this* according to his will and pleasure. Princes and potentates, states and kingdoms were prostrate before him. Every thing human was obliged to bend under the incumbent pressure of divine control.

It is not improbable, that, in this disagreeable predicament, the divine right of kings was considered as the only principle, which could be opposed to the claims of the papal throne; and as the only means, which could preserve the civil, from being swallowed by the ecclesiastical powers.

This conjecture receives a degree of probability from a fact, which is mentioned in the history of France.

In a general assembly of the states of the kingdom, it was proposed to canonize this position—"that kings derive their authority immediately from God." That

such a proposition was made in an assembly of the states, the most popular body known in the kingdom, will, no doubt, occasion surprise. This surprise will be increased, when it is mentioned, that the proposition was patronized by the most popular part of that assembly: it was the third estate, which wished to pass it into a law. But every thing is naturally and easily accounted for, when it is mentioned further, that the principal object, which the third estate had in view by this measure, was to secure the sovereign authority from the detestable maxims of those, who made it depend upon the pope, by giving him a power of absolving subjects from their oath of allegiance, and authorizing those who assassinated their princes as hereticks. [n]

The proposal did not pass into a law; because, among other reasons, the question was thought proper for the determination of the schools. But this much may safely be inferred, that what was thought proper by the third estate to be passed into a law, would be generally received through the kingdom, as popular and wholesome doctrine.

I confess myself pleased with indulging the conjecture I have mentioned.

When I entered upon the disquisition of the doctrine of a superiour as necessary to the very definition of law; I said, that, if I was not mistaken, this notion of superiority contained the germ of the divine right of princes to rule, and of the corresponding obligation on the people implicitly to obey. It may now be seen whether or not I have been mistaken; and, if I have not been mis-

[n] Puff. 656. n.

taken, it appears, how important it is, carefully and patiently to examine a first principle; to trace it, with attention, to its highest origin; and to pursue it, with perseverance, to its most remote consequences. I have observed this conduct with regard to the principle in question. The result, I think, has been, that, as to human laws, the notion of a superiour is a notion unnecessary, unfounded, and dangerous; a notion inconsistent with the genuine system of human authority.

Now that the will of a superiour is discarded, as an improper principle of obligation in human laws, it is natural to ask—What principle shall be introduced in its place? In its place I introduce—the consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation of human laws. This principle I shall view on all its sides; I shall examine it historically and legally; I shall consider it as a question of theory, and as a question of fact.

Let us ascend to the first ages of societies. Customs, for a long time, were the only laws known among them. The Lycians[o] had no written laws; they were governed entirely by customs. Among the ancient Britons also, no written laws were known: they were ruled by the traditionary—and if traditionary, probably, the customary—laws of the Druids.

Now custom is, of itself, intrinsick evidence of consent. How was a custom introduced? By voluntary adoption. How did it become general? By the instances of voluntary adoption being increased. How did it become lasting? By voluntary and satisfactory ex-

[o] 1. Gog. Or. Laws. 8.

perience, which ratified and confirmed what voluntary adoption had introduced. In the introduction, in the extension, in the continuance of customary law, we find the operations of consent universally predominant.

"Customs," in the striking and picturesque language of my Lord Bacon, "are laws written in living tables."[p] In regulations of justice and of government, they have been more effectual than the best written laws. The Romans, in their happy periods of liberty, paid great regard to customary law. Let me mention, in one word, every thing that can enforce my sentiments: the common law of England is a customary law.

Among the earliest, among the freest, among the most improved nations of the world, we find a species of law prevailing, which carried, in its bosom, internal evidence of consent. History, therefore, bears a strong and a uniform testimony in favour of this species of law.

Let us consult the sentiments[q] as well as the history of the ancients. I find a charge against them on this subject—"that they were not accurate enough in their expressions; because they frequently applied to laws the name of *common agreements*."[r] This, it is acknowledged, they do almost every where in their wri-

[p] 4. Ld. Bac. 5.

[q] Mens, et animus, et consilium, et sententia civitatis posita est in legibus. Ut corpora nostra sine mente; sic civitas sine lege, suis partibus, ut nervis, ac sanguine, et membris, uti non potest. Legum ministri, magistratus; legum interpretes, judices: legum denique idcirco omnes servi sumus, ut liberi esse possimus. Cicero pro Cluen. c. 53.

[r] Puff. 59. b. 1. c. 6. s. 7.

tings. He, however, who accuses the ancient writers of inaccuracy in expression, ought himself to be consummately accurate. "Let those teach others, who themselves excel." Whether the Baron Puffendorff was entitled to be a teacher in this particular, we stay not to examine. It is of more consequence to attend to the ground of his accusation.

One reason, why he urges their expressions to be inaccurate, is, that "neither the divine positive laws, nor the laws of nature had their rise from the agreement of men." All this is, at once, admitted; but the present disquisition relates only to laws that are human. What is said with regard to them? With regard to them it is said, that "the Grecians, as in their other politick speeches, so in this too, had an eye to their own democratical governments; in which, because the laws were made upon the proposal of the magistrate, with the knowledge, and by the command, of the people, and so, as it were, in the way of bargain and stipulation; they gave them the name of covenants and agreements."

I am now unsolicitous to repel the accusation: it seems, it was conceived to arise from a reference, by the ancients, to their democratical governments. Let them be called covenants, or agreements, or bargains, or stipulations, or any thing similar to any of those, still I am satisfied; for still every thing mentioned, and every thing similar to every thing mentioned, imports consent. Here history and law combine their evidence in support of consent.

Law has been denominated "a general convention of the citizens:" such is the definition of it in the Digest:

for the Roman law was not, in every age of Rome, the law of slavery. A similar mode of expression has been long used in England. Magna Charta was made "by the common assent of all the realm."[s]

Let us listen to the judicious and excellent Hooker: what he says always conveys instruction. "The lawful power of making laws to command whole politick societies of men, belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth, to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived, at the first, from their consent, upon whose persons they impose laws, it is no better than mere tyranny. Laws they are not, therefore, which publick approbation hath not made so."[t] "Laws human, of what kind soever, are available by consent."[u]

My Lord Shaftesbury, who formed his taste and judgment upon ancient writers and ancient opinions, delivers it as his sentiment, "That no people in a civil state can possibly be free, when they are otherwise governed, than by such laws as they themselves have constituted, or to which they have freely given consent."[v]

This subject will receive peculiar illustration and importance, when we come to consider the description and characters of municipal law. I will not anticipate here what will be introduced there with much greater propriety and force.

[s] Sulliv. Pref. 18. [t] Hooker. b. 1. s. 10. p. 19.

[u] Id. p. 20. [v] 3. Shaft. 312.

Of law there are different kinds. All, however, may be arranged in two different classes. 1. Divine. 2. Human laws. The descriptive epithets employed denote, that the former have God, the latter, man, for their author.

The laws of God may be divided into the following species.

I. That law, the book of which we are neither able nor worthy to open. Of this law, the author and observer is God. He is a law to himself, as well as to all created things. This law we may name the "law eternal."

II. That law, which is made for angels and the spirits of the just made perfect. This may be called the "law celestial." This law, and the glorious state for which it is adapted, we see, at present, but darkly and as through a glass: but hereafter we shall see even as we are seen; and shall know even as we are known. From the wisdom and the goodness of the adorable Author and Preserver of the universe, we are justified in concluding, that the celestial and perfect state is governed, as all other things are, by his established laws. What those laws are, it is not yet given us to know; but on one truth we may rely with sure and certain confidence—those laws are wise and good. For another truth we have infallible authority—those laws are strictly obeyed: "In heaven his will is done."

III. That law, by which the irrational and inanimate parts of the creation are governed. The great Creator of all things has established general and fixed rules, according to which all the phenomena of the material

universe are produced and regulated. These rules are usually denominated laws of nature. The science, which has those laws for its object, is distinguished by the name of natural philosophy. It is sometimes called, the philosophy of body. Of this science, there are numerous branches.

IV. That law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine monitors within us, and by the sacred oracles, the divine monitors without us. This law has undergone several subdivisions, and has been known by distinct appellations, according to the different ways in which it has been promulgated, and the different objects which it respects.

As promulgated by reason and the moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law.

As addressed to men, it has been denominated the law of nature; as addressed to political societies, it has been denominated the law of nations.

But it should always be remembered, that this law, natural or revealed, made for men or for nations, flows from the same divine source: it is the law of God.

Nature, or, to speak more properly, the Author of nature, has done much for us; but it is his gracious appointment and will, that we should also do much for ourselves. What we do, indeed, must be founded on what he has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must

rest its authority, ultimately, upon the authority of that law, which is divine.

Of that law, the following are maxims—that no injury should be done—that a lawful engagement, voluntarily made, should be faithfully fulfilled. We now see the deep and the solid foundations of human law.

It is of two species. 1. That which a political society makes for itself. This is municipal law. 2. That which two or more political societies make for themselves. This is the voluntary law of nations.

In all these species of law—the law eternal—the law celestial—the law natural—the divine law, as it respects men and nations—the human law, as it also respects men and nations—man is deeply and intimately concerned. Of all these species of law, therefore, the knowledge must be most important to man.

Those parts of natural philosophy, which more immediately relate to the human body, are appropriated to the profession of physick.

The law eternal, the law celestial, and the law divine, as they are disclosed by that revelation, which has brought life and immortality to light, are the more peculiar objects of the profession of divinity.

The law of nature, the law of nations, and the municipal law form the objects of the profession of law.

From this short, but plain and, I hope, just statement of things, we perceive a principle of connexi-

on between all the learned professions; but especially between the two last mentioned. Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both.

From this statement of things, we also perceive how important and dignified the profession of the law is, when traced to its sources, and viewed in its just extent.

The immediate objects of our attention are, the law of nature, the law of nations, and the municipal law of the United States, and of the several states which compose the Union. It will not be forgotten, that the constitutions of the United States, and of the individual states, form a capital part of their municipal law. On the two first of these three great heads, I shall be very general. On the last, especially on those parts of it, which comprehend the constitutions and publick law, I shall be more particular and minute.

CHAPTER III.

OF THE LAW OF NATURE.

IN every period of our existence, in every situation, in which we can be placed, much is to be known, much is to be done, much is to be enjoyed. But all that is to be known, all that is to be done, all that is to be enjoyed, depends upon the proper exertion and direction of our numerous powers. In this immense ocean of intelligence and action, are we left without a compass and without a chart? Is there no pole star, by which we may regulate our course? Has the all-gracious and all-wise Author of our existence formed us for such great and such good ends; and has he left us without a conductor to lead us in the way, by which those ends may be attained? Has he made us capable of observing a rule, and has he furnished us with no rule, which we ought to observe? Let us examine these questions—for they are important ones—with patience and with attention. Our labours will, in all probability, be amply repaid. We shall probably find that, to direct the more important parts of our conduct, the bountiful Governour of the universe has been graciously pleased to provide us with a law; and that, to direct

the less important parts of it, he has made us capable of providing a law for ourselves.

That our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles.

In the course of our remarks on that part of Sir William Blackstone's definition of law, which includes the idea of a superiour as essential to it, we remarked, with particular care, that it was only with regard to human laws that we controverted the justness or propriety of that idea. It was incumbent on us to mark this distinction particularly; for with regard to laws which are divine, they truly come from a superiour—from Him who is supreme.

Between beings, who, in their nature, powers, and situation, are so perfectly equal, that nothing can be ascribed to one, which is not applicable to the other, there can be neither superiority nor dependence. With regard to such beings, no reason can be assigned, why any one should assume authority over others, which may not, with equal propriety, be assigned, why each of those others should assume authority over that one. To constitute superiority and dependence, there must be an essential difference of qualities, on which those relations may be founded. [a]

Some allege, that the sole superiority of strength, or, as they express it, an irresistible power, is the true foundation of the right of prescribing laws. "This superi-

[a] 1. Burl. 82.

ority of power gives," say they, "a right of reigning, by the impossibility, in which it places others, of resisting him, who has so great an advantage over them." [b]

Others derive the right of prescribing laws and imposing obligations from superiour excellence of nature. "This," say they, "not only renders a being independent of those, who are of a nature inferiour to it; but leads us to believe, that the latter were made for the sake of the former." For a proof of this, they appeal to the constitution of man. "Here," they tell us, "the soul governs, as being the noblest part." "On the same foundation," they add, "the empire of man over the brute creation is built." [c]

Others, again, say, that "properly speaking, there is only one general source of superiority and obligation. God is our creator: in him we live, and move, and have our being: from him we have received our intellectual and our moral powers: he, as master of his own work, can prescribe to it whatever rules to him shall seem meet. Hence our dependence on our Creator: hence his absolute power over us. This is the true source of all authority." [d]

With regard to the first hypothesis, it is totally insufficient; nay, it is absolutely false. Because I cannot resist, am I obliged to obey? Because another is possessed of superiour force, am I bound to acknowledge his will as the rule of my conduct? Every obligation supposes motives that influence the conscience and determine the will, so that we should think it wrong not to obey, even if resistance was in our power. But a person, who

[b] 1. Burl. 83. [c] Id. 83. [d] Id. 83. 87.

alleges only the law of the strongest, proposes no motive to influence the conscience, or to determine the will. Superiour force may reside with predominant malevolence. Has force, exerted for the purposes of malevolence, a right to command? Can it impose an obligation to obey? No. Resistance to such force is a right; and, if resistance can prove effectual, it is a duty also. On some occasions, all our efforts may, indeed, be useless; and an attempt to resist would frustrate its own aim: but, on such occasions, the exercise of resistance only is suspended; the right of resistance is not extinguished: we may continue, for a time, under a constraint; but we come not under an obligation: we may suffer all the external effects of superiour force; but we feel not the internal influence of superiour authority?[e]

The second hypothesis has in it something plausible; but, on examination, it will not be found to be accurate. Wherever a being of superiour excellence is found, his excellence, as well as every other truth, ought, on proper occasions, to be acknowledged; we will go farther; it ought, as every thing excellent ought, to be esteemed. But must we go farther still? Is obedience the necessary consequence of honest acknowledgment and just esteem? Here we must make a pause: we must make some inquiries before we go forward. In what manner is this being of superiour excellence connected with us? What are his dispositions with regard to us? By what effects, if by any, will his superiour excellence be displayed? Will it be exerted for our happiness; or, as to us, will it not be exerted at all? We acknowledge—we esteem excellence; but till these questions are answered, we

[e] 1. Burl. 85. 86.

feel not ourselves under an obligation to obey it.[f] If the opinion of Epicurus concerning his divinities—that they were absolutely indifferent to the happiness and interests of men—was admitted for a moment;[g] the inference would unquestionably be—that they were not entitled to human obedience.

The third hypothesis contains a solemn truth, which ought to be examined with reverence and awe. It resolves the supreme right of prescribing laws for our conduct, and our indispensable duty of obeying those laws, into the omnipotence of the Divinity. This omnipotence let us humbly adore. Were we to suppose—but the supposition cannot be made—that infinite goodness could be disjoined from almighty power—but we cannot—must not proceed to the inference. No, it never can be drawn; for from almighty power infinite goodness can never be disjoined.

Let us join, in our weak conceptions, what are inseparable in their incomprehensible Archetype—infinite power—infinite wisdom—infinite goodness; and then we shall see, in its resplendent glory, the supreme right to rule: we shall feel the conscious sense of the perfect obligation to obey.

His infinite power enforces his laws, and carries them into full and effectual execution. His infinite wisdom knows and chooses the fittest means for accomplishing

[f] 1. Burl. 86. 87.

[g] Epicurus re tollit, oratione relinquit deos. Deinde, si maxime talis est deus, ut nulla gratia, nulla hominum caritate teneatur: valeat. Quid enim dicam, propitius sit? Cic. de Nat. Deo. l. 1. c. 44.

the ends which he proposes. His infinite goodness proposes such ends only as promote our felicity. By his power, he is able to remove whatever may possibly injure us, and to provide whatever is conducive to our happiness. By his wisdom, he knows our nature, our faculties, and our interests: he cannot be mistaken in the designs, which he proposes, nor in the means, which he employs to accomplish them. By his goodness, he proposes our happiness: and to that end directs the operations of his power and wisdom. Indeed, to his goodness alone we may trace the principle of his laws. Being infinitely and eternally happy in himself, his goodness alone could move him to create us, and give us the means of happiness. The same principle, that moved his creating, moves his governing power. The rule of his government we shall find to be reduced to this one paternal command—Let man pursue his own perfection and happiness.

What an enrapturing view of the moral government of the universe! Over all, goodness infinite reigns, guided by unerring wisdom, and supported by almighty power. What an instructive lesson to those who think, and are encouraged by their flatterers to think, that a portion of divine right is communicated to their rule. If this really was the case; their power ought to be subservient to their goodness, and their goodness should be employed in promoting the happiness of those, who are intrusted to their care. But princes, and the flatterers of princes, are guilty, in two respects, of the grossest errour and presumption. They claim to govern by divine institution and right. The principles of their government are repugnant to the principles of that government, which is

divine. The principle of the divine government is goodness: they plume themselves with the gaudy insignia of power.

Well might nature's poet say—

> ——————— Could great men thunder,
> As Jove himself does, Jove would ne'er be quiet;
> For every pelting, petty officer
> Would use his heaven for thunder;
> Nothing but thunder. Merciful heaven!
> Thou rather with thy sharp and sulphurous bolt
> Split'st the unwedgeable and gnarled oak,
> Than the soft myrtle: O, but man, proud man,
> Dressed in a little brief authority,
> Most ignorant of what he's most assured,
> His glassy substance; like an angry ape,
> Plays such fantastick tricks before high heaven,
> As make the angels weep.
>
> *Shak. Meas. for Meas. Act II.*

Where a supreme right to give laws exists, on one side, and a perfect obligation to obey them exists, on the other side; this relation, of itself, suggests the probability that laws will be made.

When we view the inanimate and irrational creation around and above us, and contemplate the beautiful order observed in all its motions and appearances; is not the supposition unnatural and improbable—that the rational and moral world should be abandoned to the frolicks of chance, or to the ravage of disorder? What would be the fate of man and of society, was every one at full liberty to do as he listed, without any fixed rule or principle of conduct, without a helm to steer him—a sport

of the fierce gusts of passion, and the fluctuating billows of caprice?

To be without law is not agreeable to our nature; because, if we were without law, we should find many of our talents and powers hanging upon us like useless incumbrances. Why should we be illuminated by reason, were we only made to obey the impulse of irrational instinct? Why should we have the power of deliberating, and of balancing our determinations, if we were made to yield implicitly and unavoidably to the influence of the first impressions? Of what service to us would reflection be, if, after reflection, we were to be carried away irresistibly by the force of blind and impetuous appetites?

Without laws, what would be the state of society? The more ingenious and artful the twolegged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life: he would become a prey to all the distractions of licentiousness and war.

Is it probable—we repeat the question—is it probable that the Creator, infinitely wise and good, would leave his moral world in this chaos and disorder?

If we enter into ourselves, and view with attention what passes in our own breasts, we shall find, that what, at first, appeared probable, is proved, on closer examination, to be certain; we shall find, that God has not left himself without a witness, nor us without a guide.

We have already observed, that, concerning the nature and cause of obligation, many different opinions have been entertained, and much ingenious disputation has been held, by philosophers and writers on jurisprudence. It will not be improper to take a summary view of those opinions.

Some philosophers maintain, that all obligation arises from the relations of things[h]; from a certain proportion or disproportion, a certain fitness or unfitness, between objects and actions, which give a beauty to some, and a deformity to others. They say, that the rules of morality are founded on the nature of things; and are agreeable to the order necessary for the beauty of the universe.[i]

Others allege, that every rule whatever of human actions carries with it a moral necessity of conforming to it; and consequently produces a sort of obligation. Every rule, say they, implies a design, and the will of attaining a certain end. He, therefore, who proposes a particular end, and knows the rule by which alone he can accomplish it, finds himself under a moral necessity of observing that rule. If he did not observe it, he would act a contradictory part; he would propose the end, and neglect the only means, by which he could obtain it. There is a reasonable necessity, therefore, to prefer one manner of acting before another; and every reasonable man finds himself engaged to this, and prevented from acting in a contrary manner. In other words, he is obliged: for obligation is nothing more than a restriction of liberty produced by reason. Reason, then, independent of law, is sufficient to impose *some* obligation

[h] 1. Ruth. 9. [i] Gro. 10.

on man, and to establish a system of morality and duty.[j]

But, according to others, the idea of obligation necessarily implies a being, who obliges, and must be distinct from him, who is obliged. If the person, on whom the obligation is imposed, is the same as he who imposes it; he can disengage himself from it whenever he pleases: or, rather, there is no obligation. Obligation and duty depend on the intervention of a superiour, whose will is manifested by law. If we abstract from all law, and consequently from a legislator; we shall have no such thing as right, obligation, duty, or morality.[k]

Others, again, think it necessary to join the last two principles together, in order to render the obligation perfect.[l] Reason, say they, is the first rule of man, the first principle of morality, and the immediate cause of all primitive obligation. But man being necessarily dependent on his Creator, who has formed him with wisdom and design, and who, in creating him, has proposed some particular ends; the will of God is another rule of human actions, another principle of morality, obligation, and duty. On this distinction, the kinds of obligation, external and internal, are founded. These two principles must be united, in order to form a complete system of morality, really founded on the nature and state of man. As a rational being, he is subject to reason: as a creature of God, to his supreme will. Thus, reason and the divine will are perfectly reconciled,

[j] Hein. 63. 1. Burl. 207. 210. 212. Puff. 17. b. 1. c. 2. s. 6.

[k] 1. Burl. 210. 212. 202. Hein. 10. [l] 1. Ruth. 9.

are naturally connected, and are strengthened by their junction. [m]

The cause of obligation is laid, by some philosophers, in utility. [n] Actions, they tell us, are to be estimated by their tendency to promote happiness. Whatever is expedient, is right. It is the utility, alone, of any moral rule, which constitutes its obligation.

Congenial with this principle, is another, which has received the sanction of some writers—that sociability, or the care of maintaining society properly, is the fountain of obligation and right: for to every right, there must be a corresponding obligation. From this principle the inference is drawn, that every one is born, not for himself alone, but for the whole human kind. [o]

Further—many philosophers derive our obligation to observe the law of nature from instinctive affections, or an innate moral sense. [p] This is the sense, they tell us, by which we perceive the qualities of right and wrong, and the other moral qualities in actions.

With regard, then, both to the meaning and the cause of obligation, much diversity of sentiment, much ambiguity, and much obscurity have, it appears, prevailed. It is a subject of inquiry, however, that well deserves to be investigated, explained, illustrated, and placed in its native splendour and dignity. In order to do this, it will be proper to ascertain the precise state of

[m] 1. Burl. 214. 216. 219. 220. [n] 1. Paley 82. Hein. 51.

[o] Hein. 50. Gro. Prel. 17. Puff. 139. b. 2. c. 3. s. 15.

[p] 1. Ruth. 9.

the question before us. It is this—what is the efficient cause of moral obligation—of the eminent distinction between right and wrong? This has been often and injudiciously blended with another question, connected indeed with it, but from which it ought to be preserved separate and distinct. That other question is—how shall we, in particular instances, learn the dictates of our duty, and make, with accuracy, the eminent distinction, which we have just now mentioned? The first question points to the *principle* of obligation: the second points to the *means* by which our obligation to perform a specified action, or a series of specified actions, may be deduced. The first has been called by philosophers—principium essendi—the principle of existence; the principle which *constitutes* obligation. The second has been called by them—principium cognoscendi—the principle of knowing it; the principle by which it may be *proved* or *perceived.* In a commonwealth, the distinction between these two questions is familiar and easy. If the question is put—what is the efficient cause of the obligation upon the citizens to obey the laws of the state?—the answer is ready—the will of those, by whose authority the laws are made. If the other question is put—how shall we, in a particular instance, or in a series of particular instances, ascertain the laws, which the citizens ought to obey?—reference is immediately made to the code of laws.

Having thus stated the question—what is the efficient cause of moral obligation?—I give it this answer—the will of God. This is the supreme law.[q] His just and full right of imposing laws, and our duty in obeying

[q] Principem legem illam et ultimam, mentem esse dicebant, omnia ratione aut cogentis, aut vetantis dei. Cic. de leg. l. 2. c. 4.

them, are the sources of our moral obligations. If I am asked—why do you obey the will of God? I answer—because it is my duty so to do. If I am asked again—how do you know this to be your duty? I answer again—because I am told so by my moral sense or conscience. If I am asked a third time—how do you know that you ought to do that, of which your conscience enjoins the performance? I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther. The science of morals, as well as other sciences, is founded on truths, that cannot be discovered or proved by reasoning. Reason is confined to the investigation of unknown truths by the means of such as are known. We cannot, therefore, begin to reason, till we are furnished, otherwise than by reason, with some truths, on which we can found our arguments. Even in mathematicks, we must be provided with axioms perceived intuitively to be true, before our demonstrations can commence. Morality, like mathematicks, has its intuitive truths, without which we cannot make a single step in our reasonings upon the subject.[r] Such an intuitive truth is that, with which we just now closed our investigation. If a person was not possessed of the feeling before mentioned; it would not be in the power of arguments, to give him any conception of the distinction between right and wrong. These terms would be to him equally unintelligible, as the term *colour* to one who was born and has continued blind. But that there is, in human nature, such a moral principle, has been felt and acknowledged in all ages and nations.

[r] Quæ est gens, aut quod genus hominum, quod non habeat sine doctrina anticipationem quandam, id est, anticeptam animo rei quandam informationem, sine qua nec intelligi quidquam, nec quæri, nec disputari potest. Cic. de nat. Deor. l. 1. c. 16.

Now that we have stated and answered the first question; let us proceed to the consideration of the second—how shall we, in particular instances, learn the dictates of our duty, and make, with accuracy, the proper distinction between right and wrong; in other words, how shall we, in particular cases, discover the will of God? We discover it by our conscience, by our reason, and by the Holy Scriptures. The law of nature and the law of revelation are both divine: they flow, though in different channels, from the same adorable source. It is, indeed, preposterous to separate them from each other. The object of both is—to discover the will of God—and both are necessary for the accomplishment of that end.

I. The power of moral perception is, indeed, a most important part of our constitution. It is an original power—a power of its own kind; and totally distinct from the ideas of utility and agreeableness. By that power, we have conceptions of merit and demerit, of duty and moral obligation. By that power, we perceive some things in human conduct to be right, and others to be wrong. We have the same reason to rely on the dictates of this faculty, as upon the determinations of our senses, or of our other natural powers. When an action is represented to us, flowing from love, humanity, gratitude, an ultimate desire of the good of others; though it happened in a country far distant, or in an age long past, we admire the lovely exhibition, and praise its author. The contrary conduct, when represented to us, raises our abhorrence and aversion. But whence this secret chain betwixt each person and mankind? If there is no moral sense, which makes benevolence appear

beautiful; if all approbation be from the interest of the approver;

"What's Hecuba to us, or we to Hecuba?"[s]

The mind, which reflects on itself, and is a spectator of other minds, sees and feels the soft and the harsh, the agreeable and the disagreeable, the foul and the fair, the harmonious and the dissonant, as really and truly in the affections and actions, as in any musical numbers, or the outward forms or representations of sensible things. It cannot withhold its approbation or aversion in what relates to the former, any more than in what relates to the latter, of those subjects. To deny the sense of a sublime and beautiful and of their contraries in actions and things, will appear an affectation merely to one who duly considers and traces the subject. Even he who indulges this affectation cannot avoid the discovery of those very sentiments, which he pretends not to feel. A Lucretius or a Hobbes cannot discard the sentiments of praise and admiration respecting some moral forms, nor the sentiments of censure and detestation concerning others. Has a man gratitude, or resentment, or pride, or shame? If he has and avows it; he must have and acknowledge a sense of something benevolent, of something unjust, of something worthy, and of something mean. Thus, so long as we find men pleased or angry, proud or ashamed; we may appeal to the reality of the moral sense. A right and a wrong, an honourable and a dishonourable is plainly conceived. About these there may be mistakes; but this destroys not the inference, that the things are, and are universally acknowledged—

[s] Hamlet.

that they are of nature's impression, and by no art can be obliterated.

This sense or apprehension of right and wrong appears early, and exists in different degrees. The qualities of love, gratitude, sympathy unfold themselves, in the first stages of life, and the approbation of those qualities accompanies the first dawn of reflection. Young people, who think the least about the distant influences of actions, are, more than others, moved with moral forms. Hence that strong inclination in children to hear such stories as paint the characters and fortunes of men. Hence that joy in the prosperity of the kind and faithful, and that sorrow upon the success of the treacherous and cruel, with which we often see infant minds strongly agitated.

There is a natural beauty in figures; and is there not a beauty as natural in actions? When the eye opens upon forms, and the ear to sounds; the beautiful is seen, and harmony is heard and acknowledged. When actions are viewed and affections are discerned, the inward eye distinguishes the beautiful, the amiable, the admirable, from the despicable, the odious, and the deformed. How is it possible not to own, that as these distinctions have their foundation in nature, so this power of discerning them is natural also?

The universality of an opinion or sentiment may be evinced by the structure of languages. Languages were not invented by philosophers, to countenance or support any artificial system. They were contrived by men in general, to express common sentiments and perceptions. The inference is satisfactory, that where all languages

make a distinction, there must be a similar distinction in universal opinion or sentiment. For language is the picture of human thoughts; and, from this faithful picture, we may draw certain conclusions concerning the original. Now, a universal effect must have a universal cause. No universal cause can, with propriety, be assigned for this universal opinion, except that intuitive perception of things, which is distinguished by the name of common sense.

All languages speak of a beautiful and a deformed, a right and a wrong, an agreeable and disagreeable, a good and ill, in actions, affections, and characters. All languages, therefore, suppose a moral sense, by which those qualities are perceived and distinguished.

The whole circle of the arts of imitation proves the reality of the moral sense. They suppose, in human conduct, a sublimity, a beauty, a greatness, an excellence, independent of advantage or disadvantage, profit or loss. On him, whose heart is indelicate or hard; on him, who has no admiration of what is truly noble; on him, who has no sympathetick sense of what is melting and tender, the highest beauty of the mimick arts must make, indeed, but a very faint and transient impression. If we were void of a relish for moral excellence, how frigid and uninteresting would the finest descriptions of life and manners appear! How indifferent are the finest strains of harmony, to him who has not a musical ear!

The force of the moral sense is diffused through every part of life. The luxury of the table derives its principal charms from some mixture of moral enjoyments, from

communicating pleasures, and from sentiments honourable and just as well as elegant—

"The feast of reason, and the flow of soul."

The chief pleasures of history, and poetry, and eloquence, and musick, and sculpture, and painting are derived from the same source. Beside the pleasures they afford by imitation, they receive a stronger charm from something moral insinuated into the performances. The principal beauties of behaviour, and even of countenance, arise from the indication of affections or qualities morally estimable.

Never was there any of the human species above the condition of an idiot, to whom all actions appeared indifferent. All feel that a certain temper, certain affections, and certain actions produce a sentiment of approbation; and that a sentiment of disapprobation is produced by the contrary temper, affections, and actions.

This power is capable of culture and improvement by habit, and by frequent and extensive exercise. A high sense of moral excellence is approved above all other intellectual talents. This high sense of excellence is accompanied with a strong desire after it, and a keen relish for it. This desire and this relish are approved as the most amiable affections, and the highest virtues.

This moral sense, from its very nature, is intended to regulate and control all our other powers. It governs our passions as well as our actions. Other principles may solicit and allure; but the conscience assumes authority, it must be obeyed. Of this dignity and commanding nature we are immediately conscious, as we are

of the power itself. It estimates what it enjoins, not merely as superiour in degree, but as superiour likewise in kind, to what is recommended by our other perceptive powers. Without this controlling faculty, endowed as we are with such a variety of senses and interfering desires, we should appear a fabrick destitute of order: but possessed of it, all our powers may be harmonious and consistent; they may all combine in one uniform and regular direction.

In short; if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings.

If we be, as, I hope, I have shown we are, endowed with this faculty; there must be some things, which are immediately discerned by it to be right, and others to be wrong. There must, consequently, be in morals, as in other sciences, first principles, which derive not their evidence from any antecedent principles, but which may be said to be intuitively discerned.

Moral truths may be divided into two classes; such as are selfevident, and such as, from the selfevident ones, are deduced by reasoning. If the first be not discerned without reasoning, reasoning can never discern the last. The cases that require reasoning are few, compared with those that require none; and a man may be very honest and virtuous, who cannot reason, and who knows not what demonstration means.

If the rules of virtue were left to be discovered by reasoning, even by demonstrative reasoning, unhappy would be the condition of the far greater part of men, who have not the means of cultivating the power of reasoning to any high degree. As virtue is the business of all men, the first principles of it are written on their hearts, in characters so legible, that no man can pretend ignorance of them, or of his obligation to practise them. Reason, even with experience, is too often overpowered by passion; to restrain whose impetuosity, nothing less is requisite than the vigorous and commanding principle of duty.

II. The first principles of morals, into which all moral argumentation may be resolved, are discovered in a manner more analogous to the perceptions of sense than to the conclusions of reasoning. In morality, however, as well as in other sciences, reason is usefully introduced, and performs many important services. In many instances she regulates our belief; and in many instances she regulates our conduct. She determines the proper means to any end; and she decides the preference of one end over another. She may exhibit an object to the mind, though the perception which the mind has, when once the object is exhibited, may properly belong to a sense. She may be necessary to ascertain the circumstances and determine the motives to an action; though it be the moral sense that perceives the action to be either virtuous or vicious, after its motive and its circumstances have been discovered. She discerns the tendencies of the several senses, affections, and actions, and the comparative value of objects and gratifications. She judges concerning subordinate ends; but concerning ultimate ends she is not employed. These we prosecute by some

immediate determination of the mind, which, in the order of action, is prior to all reasoning; for no opinion or judgment can move to action, where there is not a previous desire of some end.—This power of comparing the several enjoyments, of which our nature is susceptible, in order to discover which are most important to our happiness, is of the highest consequence and necessity to corroborate our moral faculty, and to preserve our affections in just rank and regular order.

A magistrate knows that it is his duty to promote the good of the commonwealth, which has intrusted him with authority. But whether one particular plan or another particular plan of conduct in office, may best promote the good of the commonwealth, may, in many cases, be doubtful. His conscience or moral sense determines the end, which he ought to pursue; and he has intuitive evidence that his end is good: but the means of attaining this end must be determined by reason. To select and ascertain those means, is often a matter of very considerable difficulty. Doubts may arise; opposite interests may occur; and a preference must be given to one side from a small over-balance, and from very nice views. This is particularly the case in questions with regard to justice. If every single instance of justice, like every single instance of benevolence, were pleasing and useful to society, the case would be more simple, and would be seldom liable to great controversy. But as single instances of justice are often pernicious in their first and immediate tendency; and as the advantage to society results only from the observance of the general rule, and from the concurrence and combination of several persons in the same equitable conduct; the case here becomes more intricate and involved. The

various circumstances of society, the various consequences of any practice, the various interests which may be proposed, are all, on many occasions, doubtful, and subject to much discussion and inquiry. The design of municipal law (for let us still, from every direction, open a view to our principal object) the design of municipal law is to fix all the questions which regard justice. A very accurate reason or judgment is often requisite, to give the true determination amidst intricate doubts, arising from obscure or opposite utilities.

Thus, though good and ill, right and wrong are ultimately perceived by the moral sense, yet reason assists its operations, and, in many instances, strengthens and extends its influence. We may argue concerning propriety of conduct: just reasonings on the subject will establish principles for judging of what deserves praise: but, at the same time, these reasonings must always, in the last resort, appeal to the moral sense.

Farther; reason serves to illustrate, to prove, to extend, to apply what our moral sense has already suggested to us, concerning just and unjust, proper and improper, right and wrong. A father feels that paternal tenderness is refined and confirmed, by reflecting how consonant that feeling is to the relation between a parent and his child; how conducive it is to the happiness, not only of a single family, but, in its extension, to that of all mankind. We feel the beauty and excellence of virtue; but this sense is strengthened and improved by the lessons, which reason gives us concerning the foundations, the motives, the relations, the particular and the universal advantages flowing from this virtue, which, at first sight, appeared so beautiful.

Taste is a faculty, common, in some degree, to all men. But study, attention, comparison operate most powerfully towards its refinement. In the same manner, reason contributes to ascertain the exactness, and to discover and correct the mistakes, of the moral sense. A prejudice of education may be misapprehended for a determination of morality. 'Tis reason's province to compare and discriminate.

Reason performs an excellent service to the moral sense in another respect. It considers the relations of actions, and traces them to the remotest consequences. We often see men, with the most honest hearts and most pure intentions, embarrassed and puzzled, when a case, delicate and complicated, comes before them. They feel what is right; they are unshaken in their general principles; but they are unaccustomed to pursue them through their different ramifications, to make the necessary distinctions and exceptions, or to modify them according to the circumstances of time and place. 'Tis the business of reason to discharge this duty; and it will discharge it the better in proportion to the care which has been employed in exercising and improving it.

The existence of the moral sense has been denied by some philosophers of high fame: its authority has been attacked by others: the certainty and uniformity of its decisions have been arraigned by a third class.[t] We are told, that, without education, we should have been in a state of perfect indifference as to virtue and vice; that an education, opposite to that which we have received, would have taught us to regard as virtue that which we

[t] 1. Paley 12—24. Kaims Pr. Eq. 8.

now dislike as vice, and to despise as vice that which we now esteem as virtue. In support of these observations, it is farther said, that moral sentiment is different in different countries, in different ages, and under different forms of government and religion; in a word, that it is as much the effect of custom, fashion, and artifice, as our taste in dress, furniture, and the modes of conversation. Facts and narratives have been assembled and accumulated, to evince the great diversity and even contrariety that subsists concerning moral opinions. And it has been gravely asked, whether the wild boy, who was caught in the woods of Hanover, would feel a sentiment of disapprobation upon being told of the conduct of a parricide. An investigation of those facts and narratives cannot find a place in these lectures; though the time bestowed on it might be well employed. It may, however, be proper to observe, that it is but candid to consider human nature in her improved, and not in her most rude or depraved forms. "The good experienced man," says Aristotle, "is the last measure of all things."[u] To ascertain moral principles, we appeal not to the common sense of savages, but of men in their most perfect state.

Epicurus, as well as some modern advocates of the same philosophy, seem to have taken their estimates of human nature from its meanest and most degrading exhibitions; but the noblest and most respectable philosophers of antiquity have chosen, for a much wiser and better purpose, to view it on the brightest and most advantageous side. "It is impossible," says the incomparable Addison,[v] "to read a passage in Plato or Tully, and a thousand other ancient moralists, without being a

[u] 1. Hutch. 237. 121. [v] Tatler No. 103.

greater and a better man for it. On the contrary, I could never read some modish modern authors, without being, for some time, out of humour with myself, and at every thing about me. Their business is to depreciate human nature, and consider it under its worst appearances. They give mean interpretation and base motives to the worthiest actions—in short, they endeavour to make no distinction between man and man, or between the species of men and that of brutes." True it is, that some men and some nations are savage and brutish; but is that a reason why their manners and their practices should be generally and reproachfully charged to the account of human nature? It may, perhaps, be somewhat to our purpose to observe, that in many of these representations, the picture, if compared with the original, will be found to be overcharged. For, in truth, between mankind, considered even in their rudest state, and the *mutum et turpe pecus*, a very wide difference will be easily discovered. In the most uninformed savages, we find the *communes notitiæ*, the common notions and practical principles of virtue, though the application of them is often extremely unnatural and absurd. These same savages have in them the seeds of the logician, the man of taste, the orator, the statesman, the man of virtue, and the saint. These seeds are planted in their minds by nature, though, for want of culture and exercise, they lie unnoticed, and are hardly perceived by themselves or by others. Besides, some nations that have been supposed stupid and barbarous by nature, have, upon fuller acquaintance with their history, been found to have been rendered barbarous and depraved by institution. When, by the power of some leading members, erroneous laws are once established, and it has become the interest of subordinate tyrants to support a corrupt system; errour

and iniquity become sacred. Under such a system, the multitude are fettered by the prejudices of education, and awed by the dread of power, from the free exercise of their reason. These principles will account for the many absurd and execrable tenets and practices with regard to government, morals, and religion, which have been invented and established in opposition to the unbiassed sentiments, and in derogation of the natural rights of mankind. But, after making all the exceptions and abatements, of which these facts and narratives, if admitted in their fullest extent, would justify the claim, still it cannot be denied, but is even acknowledged, that some sorts of actions command and receive the esteem of mankind more than others; and that the approbation of them is general, though not universal. It will certainly be sufficient for our purpose to observe, that the dictates of reason are neither more general, nor more uniform, nor more certain, nor more commanding, than the dictates of the moral sense. Nay, farther; perhaps, upon inquiry, we shall find, that those obliquities, extravagancies, and inconsistencies of conduct, that are produced as proofs of the nonexistence or inutility of the moral sense, are, in fact, chargeable to that faculty, which is meant to be substituted in its place. We shall find that men always approve upon an opinion—true or false, but still an opinion—that the actions approved have the qualities and tendencies, which are the proper objects of approbation. They suppose that such actions will promote their own interest; or will be conducive to the publick good; or are required by the Deity; when, in truth, they have all the contrary properties—may be forbidden by the Deity, and may be detrimental both to publick and to private good. But when all this happens, to what cause is it to be traced? Does it prove the nonexistence of a moral

sense, or does it prove, in such instances, the weakness or perversion of reason? The just solution is, that, in such instances, it is our reason, which presents false appearances to our moral sense.

It is with much reluctance, that the power of our instinctive or intuitive faculties is acknowledged by some philosophers. That the brutes are governed by instinct, but that man is governed by reason, is their favourite position. But fortunately for man, this position is not founded on truth. Our instincts, as well as our rational powers, are far superiour, both in number and in dignity, to those, which the brutes enjoy; and it were well for us, on many occasions, if we laid our reasoning systems aside, and were more attentive in observing the genuine impulses of nature. In this enlarged and elevated meaning, the sentiment of Pope [w] receives a double portion of force and sublimity.

> "And reason raise o'er instinct as you can,
> In this, 'tis God directs, in that, 'tis man."

This sentiment is not dictated merely in the fervid glow of enraptured poetry; it is affirmed by the deliberate judgment of calm, sedate philosophy. Our instincts are no other than the oracles of eternal wisdom; our conscience, in particular, is the voice of God within us: it teaches, it commands, it punishes, it rewards. The testimony of a good conscience is the purest and the noblest of human enjoyments.

It will be proper to examine a little more minutely the opinions of those, who allege reason to be the sole

[w] Ess. on Man. Ep. 3. v. 99.

directress of human conduct. Reason may, indeed, instruct us in the pernicious or useful tendency of qualities and actions: but reason alone is not sufficient to produce any moral approbation or blame. Utility is only a tendency to a certain end; and if the end be totally indifferent to us, we shall feel the same indifference towards the means. It is requisite that *sentiment* should intervene, in order to give a preference to the useful above the pernicious tendencies.

Reason judges either of relations or of matters of fact. Let us consider some particular virtue or vice under both views. Let us take the instance of *ingratitude*. This has place, when good will is expressed and good offices are performed on one side, and ill will or indifference is shown on the other. The first question is—what is that matter of fact, which is here called a vice? Indifference or ill will. But ill will is not always, nor in all circumstances a crime: and indifference may, on some occasions, be the result of the most philosophick fortitude. The vice of ingratitude, then, consists not in matter of fact.

Let us next inquire into the relations, which reason can discover, among the materials, of which ingratitude is composed. She discovers good will and good offices on one side, and ill will or indifference on the other. This is the relation of *contrariety*. Does ingratitude consist in this? To which side of the contrary relation is it to be placed? For this relation of contrariety is formed as much by good will and good offices, as by ill will or indifference. And yet the former deserves praise as much as the latter deserves blame.

If it shall be said, that the morality of an action does not consist in the relation of its different parts to one another, but in the relation of the whole actions to the rule; and that actions are denominated good or ill, as they agree or disagree with that rule; another question occurs—What is this rule of right? by what is it discovered or determined? By reason, it is said. How does reason discover or determine this rule? It must be by examining facts or the relations of things. But by the analysis which has been given of the particular instance under our consideration, it has appeared that the vice of ingratitude consists neither in the matter of fact, nor in the relation of the parts, of which the fact is composed. Objects in the animal world, nay inanimate objects, may have to each other all the same relations, which we observe in moral agents; but such objects are never supposed to be susceptible of merit or demerit, of virtue or vice.

The *ultimate* ends of human actions, can never, in any case, be accounted for by reason. They recommend themselves entirely to the sentiments and affections of men, without dependence on the intellectual faculties. Why do you take exercise? Because you desire health. Why do you desire health? Because sickness is painful. Why do you hate pain? No answer is heard. Can one be given? No. This is an ultimate end, and is not referred to any farther object.

To the second question, you may, perhaps, answer, that you desire health, because it is necessary for your improvement in your profession. Why are you anxious to make this improvement? You may, perhaps, answer again, because you wish to get money by it. Why do

you wish to get money? Because, among other reasons, it is the instrument of pleasure. But why do you love pleasure? Can a reason be given for loving pleasure, any more than for hating pain? They are both ultimate objects. 'Tis impossible there can be a progress *in infinitum*; and that one thing can always be a reason, why another is hated or desired. Something must be hateful or desirable on its own account, and because of its immediate agreement or disagreement with human sentiment and affection.

Virtue and vice are ends; and are hateful or desirable on their own account. It is requisite, therefore, that there should be some sentiment, which they touch—some internal taste or sense, which distinguishes moral good and evil, and which embraces one, and rejects the other. Thus are the offices of reason and of the moral sense at last ascertained. The former conveys the knowledge of truth and falsehood: the latter, the sentiment of beauty and deformity, of vice and virtue. The standard of one, founded on the nature of things, is eternal and inflexible. The standard of the other is ultimately derived from that supreme will, which bestowed on us our peculiar nature, and arranged the several classes and orders of existence. In this manner, we return to the great principle, from which we set out. It is necessary that reason should be fortified by the moral sense: without the moral sense, a man may be prudent, but he cannot be virtuous.

Philosophers have degraded our senses below their real importance. They represent them as powers, by which we have sensations and ideas only. But this is not the whole of their office; they judge as well as in-

form. Not confined to the mere office of conveying impressions, they are exalted to the function of judging of the nature and evidence of the impressions they convey. If this be admitted, our moral faculty may, without impropriety, be called the *moral sense*. Its testimony, like that of the external senses, is the immediate testimony of nature, and on it we have the same reason to rely. In its dignity, it is, without doubt, far superiour to every other power of the mind.

The moral sense, like all our other powers, comes to maturity by insensible degrees. It is peculiar to human nature. It is both intellectual and active. It is evidently intended, by nature, to be the immediate guide and director of our conduct, after we arrive at the years of understanding.

III. Reason and conscience can do much; but still they stand in need of support and assistance. They are useful and excellent monitors; but, at some times, their admonitions are not sufficiently clear; at other times, they are not sufficiently powerful; at all times, their influence is not sufficiently extensive. Great and sublime truths, indeed, would appear to a few; but the world, at large, would be dark and ignorant. The mass of mankind would resemble a chaos, in which a few sparks, that would diffuse a glimmering light, would serve only to show, in a more striking manner, the thick darkness with which they are surrounded. Their weakness is strengthened, their darkness is illuminated, their influence is enlarged by that heaven-descended science, which has brought life and immortality to light. In compassion to the imperfection of our internal powers, our all-gracious Creator, Preserver, and Ruler has been

pleased to discover and enforce his laws, by a revelation given to us immediately and directly from himself. This revelation is contained in the holy scriptures. The moral precepts delivered in the sacred oracles form a part of the law of nature, are of the same origin, and of the same obligation, operating universally and perpetually.

On some important subjects, those in particular, which relate to the Deity, to Providence, and to a future state, our natural knowledge is greatly improved, refined, and exalted by that which is revealed. On these subjects, one who has had the advantage of a common education in a christian country, knows more, and with more certainty, than was known by the wisest of the ancient philosophers.

One superiour advantage the precepts delivered in the sacred oracles clearly possess. They are, of all, the most explicit and the most certain. A publick minister, judging from what he knows of the interests, views, and designs of the state, which he represents, may take his resolutions and measures, in many cases, with confidence and safety; and may presume, with great probability, how the state itself would act. But if, besides this general knowledge, and these presumptions highly probable, he was furnished also with particular instructions for the regulation of his conduct; would he not naturally observe and govern himself by both rules? In cases, where his instructions are clear and positive, there would be an end of all farther deliberation. In other cases, where his instructions are silent, he would supply them by his general knowledge, and by the information, which he could collect from other quarters, concerning

the counsels and systems of the commonwealth. Thus it is with regard to reason, conscience, and the holy scriptures. Where the latter give instructions, those instructions are supereminently authentick. But whoever expects to find, in them, particular directions for every moral doubt which arises, expects more than he will find. They generally presuppose a knowledge of the principles of morality; and are employed not so much in teaching new rules on this subject, as in enforcing the practice of those already known, by a greater certainty, and by new sanctions. They present the warmest recommendations and the strongest inducements in favour of virtue: they exhibit the most powerful dissuasives from vice. But the origin, the nature, and the extent of the several rights and duties they do not explain; nor do they specify in what instances one right or duty is entitled to preference over another. They are addressed to rational and moral agents, capable of previously knowing the rights of men, and the tendencies of actions; of approving what is good, and of disapproving what is evil.

These considerations show, that the scriptures support, confirm, and corroborate, but do not supercede the operations of reason and the moral sense. The information with regard to our duties and obligations, drawn from these different sources, ought not to run in unconnected and diminished channels: it should flow in one united stream, which, by its combined force and just direction, will impel us uniformly and effectually towards our greatest good.

We have traced, with some minuteness, the efficient principle of obligation, and the several means, by which

our duty may be known. It will be proper to turn our attention back to the opinions that have been held, in philosophy and jurisprudence, concerning this subject. On a review of them, we shall now find that, in general, they are defective rather than erroneous; that they have fallen short of the mark, rather than deviated from the proper course.

The fitness of things denotes their fitness to produce our happiness: their nature means that actual constitution of the world, by which some things produce happiness, and others misery. Reason is one of the means, by which we discern between those things, which produce the former, and those things, which produce the latter. The moral sense feels and operates to promote the same essential discriminations. Whatever promotes the greatest happiness of the whole, is congenial to the principles of utility and sociability: and whatever unites in it all the foregoing properties, must be agreeable to the will of God: for, as has been said once, and as ought to be said again, his will is graciously comprised in this one paternal precept—Let man pursue his happiness and perfection.

The law of nature is immutable; not by the effect of an arbitrary disposition, but because it has its foundation in the nature, constitution, and mutual relations of men and things. While these continue to be the same, it must continue to be the same also. This immutability of nature's laws has nothing in it repugnant to the supreme power of an all-perfect Being. Since he himself is the author of our constitution; he cannot but command or forbid such things as are necessarily agreeable or disagreeable to this very constitution. He is under the

glorious necessity of not contradicting himself. This necessity, far from limiting or diminishing his perfections, adds to their external character, and points out their excellency.

The law of nature is universal. For it is true, not only that all men are equally subject to the command of their Maker; but it is true also, that the law of nature, having its foundation in the constitution and state of man, has an essential fitness for all mankind, and binds them without distinction.

This law, or right reason, as Cicero[x] calls it, is thus beautifully described by that eloquent philosopher. "It is, indeed," says he, "a true law, conformable to nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty: by its prohibitions, it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt. Neither by the senate, nor by the people, can its powerful obligation be dissolved. It requires no interpreter or commentator. It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations: for God, who is its author and promulgator, is always the sole master and sovereign of mankind."

"Man never *is*," says the poet, in a seeming tone of complaint, "but always *to be* blest." The sentiment would certainly be more consolatory, and, I think, it would be likewise more just, if we were to say—man ever *is; for* always to be blest. That we should have

[x] De Rep. l. 3.

more and better things before us, than all that we have yet acquired or enjoyed, is unquestionably a most desirable state. The reflection on this circumstance, far from diminishing our sense or the importance of our present attainments and advantages, produces the contrary effects. The present is gilded by the prospect of the future.

When Alexander had conquered a world, and had nothing left to conquer; what did he do? He sat down and wept. A well directed ambition that has conquered worlds, is exempted from the fate of that of Alexander the Great: it still sees before it more and better worlds as the objects of conquest.

It is the glorious destiny of man to be always progressive. Forgetting those things that are behind, it is his duty, and it is his happiness, to press on towards those that are before. In the order of Providence, as has been observed on another occasion, the progress of societies towards perfection resembles that of an individual. This progress has hitherto been but slow: by many unpropitious events, it has often been interrupted: but may we not indulge the pleasing expectation, that, in future, it will be accelerated, and will meet with fewer and less considerable interruptions.

Many circumstances seem—at least to a mind anxious to see it, and apt to believe what it is anxious to see—many circumstances seem to indicate the opening of such a glorious prospect. The principles and the practice of liberty are gaining ground, in more than one section of the world. Where liberty prevails, the arts and sciences lift up their heads and flourish. Where the arts and sciences flourish, political and moral improvements will

likewise be made. All will receive from each, and each will receive from all, mutual support and assistance: mutually supported and assisted, all may be carried to a degree of perfection hitherto unknown; perhaps, hitherto not believed.

"Men," says the sagacious Hooker, "if we view them in their spring, are, at the first, without understanding or knowledge at all. Nevertheless, from this utter vacuity, they grow by degrees, till they become at length to be even as the angels themselves are. That which agreeth to the one now, the other shall attain to in the end: they are not so far disjoined and severed, but that they come at length to meet."[y]

Our progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression. In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the cotemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.

A delineation of the laws of nature, has been often attempted. Books, under the appellations of institutes and systems of that law, have been often published. From what has been said concerning it, the most finished

[y] Hooker, b. 1. s. 6. p. 8.

performances executed by human hands cannot be perfect. But most of them have been rude and imperfect to a very unnecessary, some, to a shameful degree.

A more perfect work than has yet appeared upon this great subject, would be a most valuable present to mankind. Even the most general outlines of it cannot, at least in these lectures, be expected from me.

CHAPTER IV.

OF THE LAW OF NATIONS.

THE law of nature, when applied to states or political societies, receives a new name, that of the law of nations. This law, important in all states, is of peculiar importance in free ones. The States of America are certainly entitled to this dignified appellation. A weighty part of the publick business is transacted by the citizens at large. They appoint the legislature, and, either mediately or immediately, the executive servants of the publick. As the conduct of a state, both with regard to itself and others, must greatly depend upon the character, the talents, and the principles of those, to whom the direction of that conduct is intrusted; it is highly necessary that those who are to protect the rights, and to perform the duties of the commonwealth, should be men of proper principles, talents, and characters: if so, it is highly necessary that those who appoint them should be able, in some degree at least, to distinguish and select those men, whose principles, talents, and characters are proper. In order to do this, it is greatly useful that they have, at least, some just and general

knowledge of those rights that are to be protected, and of those duties that are to be performed. Without this, they will be unable to form a rational conjecture, concerning the future conduct of those whom they are to elect. Nay, what is more; without some such general and just knowledge, they will be unable to form a rational judgment, concerning the past and present conduct of those whom they have already elected; and, consequently, will be unable to form a rational determination whether, at the next election, they should reappoint them, or substitute others in their place. As the practice of the law of nations, therefore, must, in a free government, depend very considerably on the acts of the citizens, it is of high import that, among those citizens, its knowledge be generally diffused.

But, if the knowledge of the law of nations is greatly useful to those who appoint, it must surely be highly necessary to those who are appointed, the publick servants and stewards of the commonwealth. Can its interests be properly managed, can its character be properly supported, can its happiness be properly consulted, by those who know not what it owes to others, what it owes to itself, what it has a right to claim from others, and what it has a right to provide for itself? In a free commonwealth, the path to publick service and to publick honour is open to all. Should not all, therefore, sedulously endeavour to become masters of such qualifications, as will enable them to tread this path with credit to themselves, and with advantage to their country?

In the United States, a system of republicks, the law of nations acquires an importance still more peculiar and distinguished. In the United States, the law of nations,

operates upon peculiar relations, and upon those relations with peculiar energy. Well am I justified, on every account, in announcing the dignity and greatness of the subject, upon which I am now to enter.

On all occasions, let us beware of being misled by names. Though the law, which I am now to consider, receives a new appellation; it retains, unimpaired, its qualities and its power. The law of nations, as well as the law of nature, is of obligation indispensable: the law of nations, as well as the law of nature, is of origin divine.

The opinions of many concerning the law of nations have been very vague and unsatisfactory; and if such have been the opinions, we have little reason to be surprised, that the conduct of nations has too often been diametrically opposite to the law, by which it ought to have been regulated. In the judgment of some writers, it would seem, for instance, that neither the state which commences an unjust war, nor the chief who conducts it, derogates from the general sanctity of their respective characters. An ardent love of their country they seem to have thought a passion too heroick, to be restrained within the narrow limits of systematick morality; and those have been too often considered as the greatest patriots, who have contributed most to gratify the publick passion for conquest and power. States, as well as monarchs, have too frequently been blinded by ambition. Of this there is scarcely a page in ancient or in modern history, relating to national contentions, but will furnish the most glaring proofs. The melancholy truth is, that the law of nations, though founded on the most solid principles of natural obligation, has been but imper-

fectly viewed in theory, and has been too much disregarded in practice.

The profound and penetrating Bacon was not inattentive to the imperfect state, in which he found the science of the law of nations. As, in another science, that enlightened philosophical guide pointed to the discoveries of a Newton; so in this, in all probability, he laid a foundation for the researches of a Grotius. For we have reason to believe, as we are told by Barbeyrac,[a] that it was the study of the works of Lord Bacon, that first inspired Grotius with the design of writing a system concerning the law of nations. In this science Grotius did much; for he was well qualified to do much. Extensive knowledge, prodigious reading, indefatigable application to study, all these were certainly his. Yet with all these, he was far from being as successful in law, as Sir Isaac Newton was in philosophy. He was unfortunate in not setting out on right and solid principles. His celebrated book of the Rights of War and Peace is indeed useful; but it ought not to be read without a due degree of caution: nor ought all his doctrines to be received, without the necessary grains of allowance. At this we ought not to wonder, when we consider the extent, the variety, and the importance of his subject, and that, before his time, it was little known, and much neglected. His opinion concerning the source and the obligation of the law of nations is very defective. He separates that law from the law of nature, and assigns to it a different origin. "When many men," says he, "at different times and places, unanimously affirm the same thing for truth; this should be ascribed to a general

[a] Pref. to Puff. s. 29. p. 79.

cause. In the subjects treated of by us, this cause can be no other than either a just inference drawn from the principles of nature, or a universal consent. The first discovers to us the law of nature, the second the law of nations."[b] The law of nations, we see, he traces from the principle of universal consent. The consequence of this is, that the law of nations would be obligatory only upon those by whom the consent was given, and only by reason of that consent. The farther consequence would be, that the law of nations would lose a part, and the greatest part, of its obligatory force, and would also be restrained as to the sphere of its operations. That it would lose the greatest part of its obligatory force, sufficiently appears from what we have said at large concerning the origin and obligation of natural law, evincing it to be the will of God. That it would be restrained as to the sphere of its operations, appears from what Grotius himself says, when he explains his meaning in another place. He qualifies the universality of his expression by adding these words, "at least the most civilized nations;" and he afterwards says that this addition is made "with reason."[c] On the *least* civilized nations, therefore, the law of nations would not, according to his account of it, be obligatory.

I admit that there are laws of nations—perhaps it is to be wished that they were designated by an appropriate name; for names, after all, will have their influence on operations—I freely admit that there are laws of nations, which are founded altogether upon consent. National treaties are laws of nations, obligatory solely by consent. The customs of nations become laws solely by consent

[b] Gro. Prel. s. 41. [c] Gro. 14.

Both kinds are certainly voluntary. But the municipal laws of a state are not more different from the law of nature, than those voluntary laws of nations are, in their source and power, different from the law of nations, properly so called. Indeed, those voluntary laws of nations are as much under the control of the law of nations, properly so called, as municipal laws are under the control of the law of nature. The law of nations, properly so called, is the law of nature applied to states and sovereigns. The law of nations, properly so called, is the law of states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals. Universal, indispensable, and unchangeable is the obligation of both.

But it will naturally be asked, if the law of nations bears, as from this account it bears, the same relation to states, which the law of nature bears to individuals; if the law of nature and the law of nations are accompanied with the same obligatory power, and are derived from the same common source; why should the law of nations have a distinct name? Why should it be considered as a separate science? Some have thought that the difference was only in name; and if only in name, there could surely be no solid reason for establishing even that difference. Of those, who thought so, Puffendorff was one. "Many," says he,[d] "assert the law of nature and of nations to be the very same thing, differing no otherwise than in external denomination. Thus Mr. Hobbes divides natural law, into the natural law of men, and the natural law of states, commonly called the law of nations. He

[d] Puff. p. 149. b. 2. c. 3. s. 23.

observes, that the precepts of both are the same; but that as states, when once instituted, assume the personal properties of men; what we call the law of nature, when we speak of particular men, we denominate the law of nations, when we apply it to whole states, nations, or people. This opinion," continues Puffendorff, "we, for our part, readily subscribe to; nor do we conceive, that there is any other voluntary or positive law of nations, properly vested with a true and legal force, and obliging as the ordinance of a superiour power." By the way, we may here observe, that, with regard to the law of nations, Grotius and Puffendorff seem to have run into contrary extremes. The former was of opinion, that the whole law of nations took its origin and authority from consent. The latter was of opinion, that every part of the law of nations was the same with the law of nature, that no part of it could receive its obligatory force from consent; because, according to his favourite notion of law, no such thing could exist without the intervention of a superiour power. The truth seems to lie between the two great philosophers. The law of nations, properly so called, or, as it may be termed, the natural law of nations, is a part, and an important part, of the law of nature. The voluntary law of nations falls under the class of laws that are positive. If a particular name had been appropriated to this last species of law, it is probable that much confusion and ambiguity, on this subject, would have been avoided; and the distinction between the different parts of that law, comprehended, at present, under the name of the law of nations, would have been as clearly marked, as uniformly preserved, and as familiarly taken, as the well known and well founded distinction between natural and municipal law. But to return.

As Puffendorff thought that the law of nature and the law of nations were precisely the same, he has not, in his book on these subjects, treated of the law of nations separately; but has every where joined it with the law of nature, properly so called. His example has been followed by the greatest part of succeeding writers. But the imitation of it has produced a confusion of two objects, which ought to have been viewed and studied distinctly and apart. Though the law of nations, properly so called, be a part of the law of nature; though it spring from the same source; and though it is attended with the same obligatory power; yet it must be remembered that its application is made to very different objects. The law of nature is applied to individuals: the law of nations is applied to states. The important difference between the objects, will occasion a proportioned difference in the application of the law.[c] This difference in the application renders it fit that the law of nature, when applied to states, should receive an appropriate name, and should be taught and studied as a separate science.

Though states or nations are considered as moral persons; yet the nature and essence of these moral persons differ necessarily, in many respects, from the nature and essence of the individuals, of whom they are composed. The application of a law must be made in a manner suitable to its object. The application, therefore, of the law of nature to nations must be made in a manner suitable to nations: its application to individuals must be made in a manner suitable to individuals. But as nations differ from individuals; the application of the law suitable to the former, must be different from its application suitable

[c] Vat. Pref. 1.

to the latter. To nations this different application cannot be made with accuracy, with justness, and with perspicuity, without the aid of new and discriminating rules. These rules will evince, that, on the principles themselves of the law of nature, that law, when applied to nations, will prescribe decisions different from those which it would prescribe, when applied to individuals. To investigate those rules; to deduce, from the same great and leading principles, applications differing in proportion to the difference of the persons to which they are applied, is the object of the law of nations, considered as a science distinct and separate from that of the law of nature.

Having given you this general idea and description of the law of nations; need I expatiate on its dignity and importance? The law of nations is the law of sovereigns. In free states, such as ours, the sovereign or supreme power resides in the people. In free states, therefore, such as ours, the law of nations is the law of the people. Let us again beware of being misled by an ambiguity, sometimes, such is the structure of language, unavoidable. When I say that, in free states, the law of nations is the law of the people; I mean not that it is a law made by the people, or by virtue of their delegated authority; as, in free states, all municipal laws are. But when I say that, in free states, the law of nations is the law of the people; I mean that, as the law of nature, in other words, as the will of nature's God, it is indispensably binding upon the people, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power, or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to

every state, for the happiness of each, and for the happiness of all. How vast—how important—how interesting are these truths! They announce to a free people how exalted their rights; but, at the same time, they announce to a free people how solemn their duties are. If a practical knowledge and a just sense of these rights and these duties were diffused among the citizens, and properly impressed upon their hearts and minds; how great, how beneficial, how lasting would be their fruits! But, unfortunately, as there have been and there are, in arbitrary governments, flatterers of princes; so there have been and there are, in free governments, flatterers of the people. One distinction, indeed, is to be taken between them. The latter herd of flatterers persuade the people to make an improper use of the power, which of right they have: the former herd persuade princes to make an improper use of power, which of right they have not. In other respects, both herds are equally pernicious. Both flatter to promote their private interests: both betray the interests of those whom they flatter.

It is of the highest, and, in free states, it is of the most general importance, that the sacred obligation of the law of nations should be accurately known and deeply felt. Of all subjects, it is agreeable and useful to form just and adequate conceptions; but of those especially, which have an influence on the practice and morality of states. For it is a serious truth, however much it has been unattended to in practice, that the laws of morality are equally strict with regard to societies, as to the individuals of whom the societies are composed. It must be owing either to ignorance, or to a very unjustifiable disregard to this great truth, that some transactions of

publick bodies have often escaped censure, nay, sometimes have received applause, though those transactions have been such, as none of the individuals composing those bodies would have dared to introduce into the management of his private affairs; because the person introducing them would have been branded with the most reproachful of names and characters. It has been long admitted, by those who have been the best judges of private life and manners, that integrity and sound policy go hand in hand. It is high time that this maxim should find an establishment in the councils of states, and in the cabinets of princes. Its establishment there would diffuse far and wide the most salutary and benign effects.

Opinions concerning the extent of the law of nations have not been less defective and inadequate, than those concerning its origin and obligatory force. Some seem to have thought, that this law respects and regulates the conduct of nations only in their intercourse with each other. A very important branch of this law—that containing the duties which a nation owes itself—seems to have escaped their attention. "The general principle," says Burlamaqui,[f] "of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals. Thus the law of natural equality, which prohibits injury and commands the reparation of damage done; the law of beneficence, and of fidelity to our engagements, are laws respecting nations, and imposing, both on the people and on their respective sovereigns, the same duties as are prescribed to individuals." Seve-

[f] 2. Burl. 3. 4. 1. Burl. 196

ral other writers concerning the law of nations appear to have formed the same imperfect conceptions with regard to its extent. Let us recur to what the law of nature dictates to an individual. Are there not duties which he owes to himself? Is he not obliged to consult and promote his preservation, his freedom, his reputation, his improvement, his perfection, his happiness? Now that we have seen the law of nature as it respects the duties of individuals, let us see the law of nations as it respects the duties of states, to themselves: for we must recollect that the law of nations is only the law of nature judiciously applied to the conduct of states. From the duties of states, as well as of individuals, to themselves, a number of corresponding rights will be found to arise.

A state ought to attend to the preservation of its own existence. In what does the existence of a state consist? It consists in the association of the individuals, of which it is composed. In what consists the preservation of this existence? It consists in the duration of that association. When this association is dissolved, the state ceases to exist; though all the members, of whom it was composed, may still remain. It is the duty of a state, therefore, to preserve this association undissolved and unimpaired. But in this, as in many other instances, a difference between the nature of states and the nature of individuals will occasion, for the reasons already mentioned, a proportioned difference in the application of the law of nature. Nations, as well as men, are taught by the law of nature, gracious in its precepts, to consider their happiness as the great end of their existence. But without existence there can be no happiness: the means, therefore, must be secured, in order to secure the end. But yet, between the duty of self-preservation

required from a state, and the duty of self-preservation required from a man, there is a most material difference; and this difference is founded on the law of nature itself. A nation has a right to assign to its existence a voluntary termination: a man has not. What can be the reasons of this difference? Several may be given. By the voluntary act of the individuals forming the nation, the nation was called into existence: they who bind, can also untie: by the voluntary act, therefore, of the individuals forming the nation, the nation may be reduced to its original nothing. But it was not by his own voluntary act that the man made his appearance upon the theatre of life; he cannot, therefore, plead the right of the nation, by his own voluntary act to make his exit. He did not make; therefore, he has no right to destroy himself. He alone, whose gift this state of existence is, has the right to say when and how it shall receive its termination.

Again; though nations are considered as moral persons, and, in that character, as entitled, in many respects, to claim the rights, and as obliged, in many respects, to perform the duties of natural persons; yet we must always remember that of natural persons those moral persons are composed; that for the sake of natural persons those moral persons were formed; and that while we suppose those moral persons to live, and think, and act, we know that they are natural persons alone, who really exist or feel, who really deliberate, resolve, and execute. Now none of these observations resulting from the nature and essence of the nation, can be applied, with any degree of propriety, to the nature and essence of the man: and, therefore, the inferences drawn from these observations, with regard to the case of the nation, are wholly inapplicable to the case of the man.

One of these inferences is, that as it was for the happiness of the members that the moral existence of the nation was produced; so the happiness of the members may require this moral existence to be annihilated. Can this inference be applied to the man?

Further; there may be a moral certainty, that, of the voluntary dissolution of the nation, the necessary consequence will be an increase of happiness. Can such a consequence be predicted, with moral certainty, concerning the voluntary death of the man?

This instance shows, in a striking manner, how, on some occasions, the law of nature, when applied to a nation, may dictate or authorize a measure of conduct very different from that, which it would authorize and dictate with regard to a man.

As it is, in general, the duty of a state to preserve itself; so it is, in general, its duty to preserve its members. This is a duty which it owes to them, and to itself. It owes it to them, because their advantage was the final cause of their joining in the association, and engaging to support it; and they ought not to be deprived of this advantage, while they fulfil the conditions, on which it was stipulated. This duty the nation owes to itself, because the loss of its members is a proportionable loss of its strength; and the loss of its strength is proportionably injurious both to its security, and to its preservation. The result of these principles is, that the body of a nation should not abandon a country, a city, or even an individual, who has not forfeited his rights in the society.

The right and duty of a state to preserve its members are subject to the same limitations and conditions, as its right and duty to preserve itself. As, for some reasons, the society may be dissolved; so, for others, it may be dismembered. A part may be separated from the other parts; and that part may either become a new state, or may associate with another state already formed. An illustration of this doctrine may be drawn from a recent instance, which has happened in the commonwealth of Virginia. The district of Kentucky has, by an amicable agreement, been disjoined from the rest of the commonwealth, and has been formed into a separate state. It is a pleasure, perhaps I may add it is a laudable pride, to be able to furnish, to the world, the first examples of carrying into practice the most sublime parts of the most sublime theories of government and law.

When a nation has a right, and is under an obligation to preserve itself and its members; it has, by a necessary consequence, a right to do every thing, which, without injuring others, it can do, in order to accomplish and secure those objects. The law of nature prescribes not impossibilities: it imposes not an obligation, without giving a right to the necessary means of fulfilling it. The same principles, which evince the right of a nation to do every thing, which it lawfully may, for the preservation of itself and of its members, evince its right, also, to avoid and prevent, as much as it lawfully may, every thing which would load it with injuries, or threaten it with danger.

It is the right, and generally it is the duty, of a state, to form a constitution, to institute civil government, and

to establish laws. If the constitution formed, or the government instituted, or the laws established shall, on experience, be found weak, or inconvenient, or pernicious; it is the right, and it is the duty of the state to strengthen, or alter, or abolish them. These subjects will be fully treated in another place.

A nation ought to know itself. It ought to form a just estimate of its own situation, both with regard to itself and to its neighbours. It ought to learn the excellencies, and the blemishes likewise of its own constitution. It ought to review the instances in which it has already attained, and it ought to ascertain those in which it falls short of, a practicable degree of perfection. It ought to find out what improvements are peculiarly necessary to be promoted, and what faults it is peculiarly necessary to avoid. Without a discriminating sagacity of this kind, the principle of imitation, intended for the wisest purposes in states as well as in individuals, would be always an uncertain, sometimes a dangerous guide. A measure extremely salutary to one state, might be extremely injurious to another. What, in one situation, would be productive of peace and happiness, might, in another, be the unfortunate cause of infelicity and war. Above all things, the genius and manners of the people ought to be carefully consulted. The government ought to be administered agreeably to this genius and these manners; but how can this be done, if this genius and these manners are unknown? This duty of self-knowledge is of vast extent and of vast importance, in nations as well as in men.

To love and to deserve honest fame, is another duty of a people, as well as of an individual. The reputation of a

state is not only a pleasant, it is also a valuable possession. It attracts the esteem, it represses the unfriendly inclinations of its neighbours. This reputation is acquired by virtue, and by the conduct which virtue inspires. It is founded on the publick transactions of the state, and on the private behaviour of its members.

A state should avoid ostentation, but it should support its dignity. This should never be suffered to be degraded among other nations. In transactions between states, an attention to this object is of much greater importance than is generally imagined. Even the marks and titles of respect, to which a nation, and those who represent a nation, are entitled, ought not to be considered as trivial: they should be claimed with firmness: they should be given with alacrity. The dignity, the equality, the mutual independence, and the frequent intercourse of nations render such a tenour of conduct altogether indispensable.

It is the duty of a nation to intrust the management of its affairs only to its wisest and best citizens. The immense importance of this duty is easily seen; but it is not sufficiently regarded. The meanest menial of a family will not be received without examination and cautious inquiry. The most important servants of the publick will be voted in without consideration and without care. In electioneering, as it is called, we frequently find warm recommendations and active intrigues in favour of candidates for the highest offices, to whom the recommenders and intriguers would not, if put to the test, intrust the management of the smallest part of their own private interest. An election ground, the great theatre of original sovereignty, on which nothing but inviolable integrity and independent virtue should be exhibited, is often and

lamentably transformed into a scene of the vilest and lowest debauchery and deception. An election maneuvre, an election story, are names appropriated to a conduct, which, in other and inferiour transactions, would be branded, and justly branded, with the most opprobrious appellations. Even those, who may be safely trusted every where else, will play false at elections. The remarks, which I have made concerning general elections, may be too often made, with equal truth, concerning other appointments to offices. But these things ought not to be. When the obligation and the importance of the great national duty required at elections—a duty prescribed by him who made us free—a duty prescribed that we may continue free—when all this shall be sufficiently diffused, and known, and felt; these things will not be. The people will then elect conscientiously; and will require conscientious conduct from those whom they elect.

A nation ought to encourage true patriotism in its members. The first step towards this encouragement is to distinguish between its real and its pretended friends. The discrimination, it is true, is often difficult, sometimes impracticable: but it is equally true, that it may frequently be made. Let the same care be employed, let the same pains be taken, to ascertain the marks of deceit and the marks of sincerity in publick life, and in intriguing for publick office, which are usually taken and employed in private life, and in solicitations for acts of private friendship. The care and pains will sometimes, indeed, be fruitless; but they will sometimes, too, be successful; at all times, they will be faithful witnesses, that those, who have employed them, have discharged their duty.

If a nation establish itself, or extend its establishment in a country already inhabited by others; it ought to observe strict justice, in both instances, with the former inhabitants. This is a part of the law of nations, that very nearly concerns the United States. It ought, therefore, to be well understood. The whole earth is allotted for the nourishment of its inhabitants; but it is not sufficient for this purpose, unless they aid it by labour and culture. The cultivation of the earth, therefore, is a duty incumbent on man by the order of nature. Those nations that live by hunting, and have more land than is necessary even for the purposes of hunting, should transfer it to those who will make a more advantageous use of it: those who will make this use of it ought to pay, for they can afford to pay, a reasonable equivalent. Even when the lands are no more than sufficient for the purposes of hunting, it is the duty of the new inhabitants, if advanced in society, to teach, and it is the duty of the original inhabitants, if less advanced in society, to learn, the arts and uses of agriculture. This will enable the latter gradually to contract, and the former gradually to extend their settlements, till the science of agriculture is equally improved in both. By these means, the intentions of nature will be fulfilled; the old and the new inhabitants will be reciprocally useful; peace will be preserved, and justice will be done.

It is the duty of a nation to augment its numbers. The performance of this duty will naturally result from the discharge of its other duties: by discharging them, the number of persons born in the society will be increased; and strangers will be incited to wish a participation in its blessings. Among other means of increasing the number of citizens, there are three of

peculiar efficacy. The first is, easily to receive all strangers of good character, and to communicate to them the advantages of liberty. The state will be thus filled with citizens, who will bring with them commerce and the arts, and a rich variety of manners and characters. Another means conducive to the same end is, to encourage marriages. These are the pledges of the state. A third means for augmenting the number of inhabitants is, to preserve the rights of conscience inviolate. The right of private judgment is one of the greatest advantages of mankind; and is always considered as such. To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation.

A nation should aim at its perfection. The advantage and improvement of the citizens are the ends proposed by the social union. Whatever will render that union more perfect will promote these ends. The same principles, therefore, which show that a man ought to pursue the perfection of his nature, will show, likewise, that the citizens ought to contribute every thing in their power towards the perfection of the state. This right involves the right of preventing and avoiding every thing, which would interrupt or retard the progress of the state towards its perfection. It also involves the right of acquiring every thing, without which its perfection cannot be promoted or obtained.

Happiness is the centre, to which men and nations are attracted: it is, therefore, the duty of a nation to consult its happiness. In order to do this, it is necessary that the nation be instructed to search for happiness where

happiness is to be found. The impressions that are made first, sink deepest; they frequently continue through life. That seed, which is sown in the tender minds of youth, will produce abundance of good, or abundance of evil. The education of youth, therefore, is of prime importance to the happiness of the state. The arts, the sciences, philosophy, virtue, and religion, all contribute to the happiness, all, therefore, ought to receive the encouragement, of the nation. In this manner, publick and private felicity will go hand in hand, and mutually assist each other in their progress.

When men have formed themselves into a state or nation, they may reciprocally enter into particular engagements, and, in this manner, contract new obligations in favour of the members of the community; but they cannot, by this union, discharge themselves from any duties which they previously owed to those, who form no part of the union. They continue under all the obligations required by the universal society of the human race—the great society of nations. The law of that great and universal society requires, that each nation should contribute to the perfection and happiness of the others. It is, therefore, a duty which every nation owes to itself, to acquire those qualifications, which will fit and enable it to discharge those duties which it owes to others. What those duties are, we shall now very concisely and summarily inquire.

The first and most necessary duty of nations, as well as of men, is to do no wrong or injury. Justice is a sacred law of nations. If the law of the great society of nations requires, as we have seen it to require, that each should contribute to the perfection and happiness

of others; the first degree of this duty surely is, that each should abstain from every thing, which would positively impair that perfection and happiness. This great principle prohibits one nation from exciting disturbances in another, from seducing its citizens, from depriving it of its natural advantages, from calumniating its reputation, from debauching the attachment of its allies, from fomenting or encouraging the hatred of its enemies. If, however, a nation, in the necessary prosecution of its own duties and rights, does what is disagreeable or even inconvenient to another, this is not to be considered as an injury; it ought to be viewed as the unavoidable result, and not as the governing principle of its conduct. If, at such conduct, offence is taken, it is the fault of that nation, which takes, not of that nation, which occasions it.

But nations are not only forbidden to do evil; they are also commanded to do good to one another. The duties of humanity are incumbent upon nations as well as upon individuals. An individual cannot subsist, at least he cannot subsist comfortably, by himself. What is true concerning one, is true concerning all. Without mutual good offices and assistance, therefore, happiness could not be procured, perhaps existence could not be preserved. Hence the necessity of the duties of humanity among individuals. Every one is obliged, in the first place, to do what he can for himself; in the next, to do what he can for others; beginning with those with whom he is most intimately connected. The consequence is, that each man is obliged to give to others every assistance, for which they have a real occasion, and which he can give without being wanting to himself. What each is obliged to perform for others, from others

he is entitled to receive. Hence the advantage as well as the duty of humanity. These principles receive an application to states as well as to men. Each nation owes to every other the duties of humanity. It is true, there may be some difference in the application, in this as well as in other instances: but the principles of the application are the same. A nation can subsist by itself more securely and more comfortably than an individual can; therefore the duty of mutual assistance will not, at all periods, be equally indispensable, or return with equal frequency. But when it becomes, as it may become, equally indispensable; and when it returns, as it may return, with equal frequency; it ought, in either case, to be equally performed. One individual may attack another daily: a longer time is necessary for the aggression of one nation upon another. The assistance, therefore, which ought to be given to the individual daily, will be necessary for the nation only at more distant intervals of time. But between nations, what the duties of humanity lose in point of frequency, they gain in point of importance, in proportion, perhaps, to the difference between a single individual, and all those individuals of whom the nation is composed.

One nation ought to give to another, not only the assistance necessary to its preservation, but that also which is necessary to its perfection, whenever it is wanted, and whenever, consistently with other superiour duties, it can be given. The cases in which assistance ought to be demanded, and those in which it ought to be given, must be decided respectively by that nation which demands, and by that of which the demand is made. It is incumbent on each to decide properly; not

to demand, and not to refuse, without strong and reasonable cause.

It may, perhaps, be uncommon, but it is certainly just, to say that nations ought to love one another. The offices of humanity ought to flow from this pure source. When this happily is the case, then the principles of affection and of friendship prevail among states as among individuals: then nations will mutually support and assist each other with zeal and ardour; lasting peace will be the result of unshaken confidence; and kind and generous principles, of a nature far opposite to mean jealousy, crooked policy, or cold prudence, will govern and prosper the affairs of men. And why should not this be the case? When a number of individuals, by the social union, become fellow citizens, can they, by that union, devest themselves of that relation, which subsists between them and the other—the far greater—part of the human species? With regard to those, can they cease to be men?

The love of mankind is an important duty and an exalted virtue. Much has been written, much has been said concerning the power of *intellectual* abstraction, which man possesses, and which distinguishes him so eminently from the inferiour orders of animals. But little has been said, and little has been written, concerning another power of the human mind, still more dignified, and, beyond all comparison, more amiable—I may call it the power of *moral* abstraction.

All things in nature are individuals. But when a number of individuals have a near and striking resemblance, we, in our minds, class them together, and re-

fer them to a species, to which we assign a name. Again; when a number of species have a resemblance, though not so near and striking, we, in the same manner, class them also together, and refer them to a genus, to which we likewise assign a name. Different genera may have a resemblance, though still less close and striking; we refer them to a higher genus, till we arrive at *being*, the highest genus of all. This is the progress of intellectual abstraction.

We are possessed of a moral power, similar in its nature and in its progress—a principle of good will as well as of knowledge. This principle of benevolence is indeed primarily and chiefly directed towards individuals, those especially, with whom we are or wish to be most intimately connected. But this principle, as well as the other, is capable of abstraction, and of embracing general objects. The culture, the improvement, and the extension of this principle ought to have made, in the estimation of philosophers, as important a figure among the moral, as the other has made among the intellectual powers and operations of the mind; for it is susceptible of equal culture, of equal improvement, and of equal extension.

"After having," says the illustrious Neckar, in his book concerning the importance of religious opinions,[g] "proved myself a citizen of France, by my administration, as well as my writings, I wish to unite myself to a fraternity still more extended, that of the whole human race. Thus, without dispersing our sentiments, we may be able to communicate ourselves a great way off, and

[g] Pref. 19.

enlarge, in some measure, the limits of our circle. Glory be to our thinking faculties for it! to that spiritual portion of ourselves, which can take in the past, dart into futurity, and intimately associate itself with the destiny of men of all countries and of all ages!"

To the same purpose is the sentiment of Cicero, in his beautiful treatise on the nature and offices of friendship.[h] "In tracing the social laws of nature," says he, "it seems evident, that man, by the frame of his moral constitution, is supposed to consider himself as standing in some degree of social relation to the whole species in general; and that this principle acts with more or less vigour, according to the distance at which he is placed with respect to any particular community or individual of his kind."

This principle of benevolence and sociability, which is not confined to one sect or to one state, but ranges excursive through the whole expanded theatre of men and nations, instead of being always acknowledged and always recommended, as it ought to have been, has been altogether omitted by some philosophers: by some, its existence seems to have been doubted or denied.

"Some sort of union," says Rutherforth, in his institutes of natural law,[i] "there is between all nations: they are all included in the collective idea of mankind, and are frequently spoken of under this general name. But this is not a social union: the several parts of the collective idea, whether we consider the great body of mankind as made up of individuals or of nations, are not connect-

[h] c. 5. [i] Vol. 2. 463. 464.

ed, as the several parts of a civil society are, by compact among themselves: the connexion is merely notional, and is only made by the mind, for its own convenience."

The very enlarged active power, concerning which I speak, is, to this day, so far as I know, without an appropriated name. The term *philanthropy* approaches near, but does not reach it. We sometimes call it *patriotism*, by a figurative extension of that term, which, in its proper meaning, denotes a circle of benevolence limited by the state, of which one is a member. When we speak of the most exalted of all characters, of the man who possesses this virtue, we generally describe him, by a metaphor, a "citizen of the world." A "man of the world," which would be the more natural expression, though it is in common use, is used to convey a very different idea.

If the general observations, which I have before made concerning the nature, the structure, and the evidence of language, be well founded, the particular remarks I have now made will appear to be striking and just.

This power of moral abstraction should be exercised and cultivated with the highest degree of attention and zeal. It is as necessary to the progress of exalted virtue, as the power of intellectual abstraction is to the progress of extensive knowledge. The progress of the former will be accompanied with a degree of pleasure, of utility, and of excellence, far superiour to any degree of those qualities, which can accompany the latter. The purest pleasures of mathematical learning spring from the source of accurate and extended intellectual abstraction. But those pleasures, pure as they are, must yield the palm to those, which arise from abstraction of the moral kind.

By this power, exerted in different proportions, the commonwealth of Pennsylvania, the empire of the United States, the civilized and commercial part of the world, the inhabitants of the whole earth, become objects of a benevolence the warmest, and of a spirit the most patriotick; for custom, the arbitress of language, has not yet authorized a more appropriate epithet. By this power, a number of individuals, who, considered separately, may be so minute, so unknown, or so distant, as to elude the operations of our benevolence, yet, comprehended under one important and distinguished aspect, may become a general and complex object, which will warm and dilate the soul. By this power the capacity of our nature is enlarged; men, otherwise invisible, are rendered conspicuous; and become known to the heart as well as to the understanding.

This enlarged and elevated virtue ought to be cultivated by nations with peculiar assiduity and ardour. The sphere of exertion, to which an individual is confined, is frequently narrow, however enlarged his disposition may be. But the sphere, to the extent of which a state may exert herself, is often comparatively boundless. By exhibiting a glorious example in her constitution, in her laws, in the administration of her constitution and laws, she may diffuse reformation, she may diffuse instruction, she may diffuse happiness over this whole terrestrial globe.

How often and how fatally are expressions and sentiments perverted! How often and how fatally is perverted conduct the unavoidable and inveterate effect of perverted sentiment and expression! What immense treasures have been exhausted, what oceans of human blood have been

shed, in France and England, by force of the expression "natural enemy!" 'Tis an unnatural expression. The antithesis is truly in the thought: for natural enmity forms no title in the genuine law of nations, part of the law of nature. It is adopted from a spurious code.

The foregoing rules and maxims of national law, though they are the sacred, the inviolable, and the exalted precepts of nature, and of nature's Author, have been long unknown and unacknowledged among nations. Even where they have been known and acknowledged, their calm still voice has been drowned by the solicitations of interest, the clamours of ambition, and the thunder of war. Many of the ancient nations conceived themselves to be under no obligations whatever to other states or the citizens of other states, unless they could produce in their favour a connexion formed and cemented by a treaty of amity.

At last, however, the voice of nature, intelligible and persuasive, has been heard by nations that are civilized: at last it is acknowledged that mankind are all brothers: the happy time is, we hope, approaching, when the acknowledgment will be substantiated by a uniform corresponding conduct.

How beautiful and energetick are the sentiments of Cicero on this subject. "It is more consonant to nature," that is, as he said a little before, to the law of nations, "to undertake the greatest labours, and to undergo the severest trouble, for the preservation and advantage of all nations, if such a thing could be accomplished, than to live in solitary repose, not only without pain, but surrounded with all the allurements of pleasure and wealth.

Every one of a good and great mind, would prefer the first greatly before the second situation in life." "It is highly absurd to say, as some have said, that no one ought to injure a parent or a brother, for the sake of his own advantage; but that another rule may be observed concerning the rest of the citizens: such persons determine that there is no law, no bonds of society among the citizens, for the common benefit of the commonwealth. This sentiment tends to dissolve the union of the state. Others, again, admit that a social regard is to be paid to the citizens, but deny that this regard ought to be extended in favour of foreigners: such persons would destroy the common society of the human race; and if this common society were destroyed, the destruction would involve, in it, the fate also of beneficence, liberality, goodness, justice. Which last virtue is the mistress and the queen of all the other virtues."[j] By justice here, Cicero clearly means that universal justice, which is the complete accomplishment of the law of nature.

It has been already observed, that there is one part of the law of nations, called their voluntary law, which is founded on the principle of consent: of this part, publick compacts and customs received and observed by civilized states form the most considerable articles.

Publick compacts are divided into two kinds—treaties and sponsions. Treaties are made by those who are empowered, by the constitution of a state, to represent it in its transactions with other nations. Sponsions are made by an inferiour magistrate or officer, on behalf of

[j] Cic. de off. l. 3. c. 5. 6.

the state, but without authority from it. Such compacts, therefore, do not bind the state, unless it confirms them after they are made. These take place chiefly in negotiations and transactions between commanding officers, during a war.

Though the power of making treaties is usually, it is not necessarily annexed to sovereign power. Some of the princes and free cities of Germany, though they hold of the emperour and the empire, have nevertheless the right of making treaties with foreign nations: this right, as well as several other rights of sovereignty, the constitution of the empire has secured to them.

With a policy, wiser and more profound, because it shuts the door against foreign intrigues with the members of the union, no state comprehended within our national government, can enter into any treaty, alliance, or confederation. [k]

It is in the constitution or fundamental laws of every nation, that we must search, in order to discover what power it is, which has sufficient authority to contract, with validity, in the name of the state.

A treaty is valid, if there has been no essential defect in the manner, in which it has been made; and, in order to guard against essential defects, it is only necessary that there be sufficient power in the contracting parties, that their mutual consent be given, and that that consent be properly declared.

[k] Cons. U. S. art. 1. s. 10.

It is a truth certain in the law of nature, that he who has made a promise to another, has given to that other a perfect right to demand the performance of the promise. Nations and the representatives of nations, therefore, ought to preserve inviolably their treaties and engagements: by not preserving them, they subject themselves to all the consequences of violating the perfect right of those, to whom they were made. This great truth is generally acknowledged; but too frequently an irreligious disregard is shown to it in the conduct of princes and states. But such a disregard is weak as well as wicked. In publick as in private life, among sovereigns as among individuals, honesty is the best policy, as well as the soundest morality. Among merchants, credit is wealth; among states and princes, good faith is both respectability and power.

A state, which violates the sacred faith of treaties, violates not only the voluntary, but also the natural and necessary law of nations; for we have seen that, by the law of nature, the fulfilment of promises is a duty as much incumbent upon states as upon men. Indeed it is more incumbent on the former than on the latter; for the consequences both of performing and of violating the engagements of the former, are generally more important and more lasting, than any which can flow from engagements performed or violated by individuals. Hence the strict propriety, as well as the uncommon beauty of the sentiment—that if good faith were banished from every other place, she should find an inviolable sanctuary at least in the bosoms of princes.

Every treaty should be illuminated by perspicuity and candour. A tricking minister is, in real infamy, de-

graded as much below a vulgar cheat, as the dignity of states is raised above that of private persons. Ability and address in negotiation may be used to avoid, never to accomplish a surprise.

Fraud in the subsequent interpretation, is equally base and dishonourable as fraud in the original structure of treaties. In the scale of turpitude, it weighs equally with the most flagrant and notorious perfidy.

Treaties and alliances are either personal or real. The first relate only to the contracting parties, and expire with those who contract. The second relate to the state, in whose name and by whose authority the contract was made, and are permanent as the state itself, unless they determine, at another period, by their own limitation.

Every treaty or alliance made with a commonwealth is, in its own nature, real; for it has reference solely to the body of the state. When a free people make an engagement, it is the nation which contracts. Its stipulations depend not on the lives of those, who have been the instruments in forming the treaty: nor even on the lives of those citizens, who were alive when the treaty was formed. They change; but the commonwealth continues the same.

Hence the stability and the security of treaties made with commonwealths. By the faithful observance of their treaties, the Cantons of Switzerland have rendered themselves respectable and respected over all Europe. Let it be mentioned to the honour of the parliament of Great Britain, that it has frequently thanked its king for

his zeal and attachment to the treaties, in which he has engaged the nation.

The corruption of the best things and institutions, however, always degenerates into the worst. The citizens of Carthage prostituted the character of their republick to such a degree, that, if we may believe the testimony of an enemy, *Punica fides* became proverbial, over the ancient world, to denote the extreme of perfidy.

As the United States have surpassed others, even other commonwealths, in the excellence of their constitution and government; it is reasonably to be hoped, that they will surpass them, likewise, in the stability of their laws, and in their fidelity to their engagements.

In the great chart of the globe of credit, we hope to see American placed as the very antipode of Carthaginian faith.

CHAPTER V.

OF MUNICIPAL LAW.

I NOW proceed to the consideration of municipal law—that rule, by which a state or nation is governed. It is thus defined by the learned Author of the Commentaries on the Laws of England: "A rule of civil conduct, prescribed by the *supreme power* of the state, commanding what is right and prohibiting what is wrong."[a] In my observations upon Sir William Blackstone's definition of law in general, I did him the justice to mention, that he was not the first, and that he has not been the last, who has defined law upon the same principles, or upon principles similar, and equally dangerous. Here it is my duty to mention, and, in one respect, I am happy in mentioning, that he was the first, though, I must add, he has not been the last, who has defined municipal law, as applied to the law of England, upon principles, to which I must beg leave to assign the epithets, dangerous and unsound. It is of high import to the liberties of the United States, that the seeds of despotism be not permit-

[a] 1. Bl. Com. 44.

ted to lurk at the roots of our municipal law. If they shall be suffered to remain there, they will, at some period or another, spring up and produce abundance of pestiferous fruit. Let us, therefore, examine, fully and minutely, the extent, the grounds, the derivation, and the consequences of the abovementioned definition.

"Legislature," we are told, "is the greatest act of superiority, that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are, indeed, convertible terms; one cannot subsist without the other."[b] "There must be in every government, however it began, or by whatsoever right it subsists, a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside." "By sovereign power is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration, by a new edict or rule, and to put the execution of the laws into whatever hands it pleases: and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end."[c] "In the British parliament, is lodged the sovereignty of the British constitution."[d] "The power of making laws constitutes the supreme authority."[e] "In the British parliament," therefore, which is the legislative power, "the supreme

[b] 1. Bl. Com. 46. [c] Id. 48. 49.

[d] Id. 51. [e] Id. 52.

and absolute authority of the state is vested."[f] "This is the place, where that absolute despotick power, which must, in all governments, reside somewhere, is intrusted by the constitution of these kingdoms." "Its power and jurisdiction is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."[g] "It can change and create afresh even the constitution of the kingdom and of parliaments themselves. It can, in short, do every thing that is not naturally impossible." "What the parliament doth, no authority upon earth can undo."[h] "So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."[i] "Hence the known apothegm of the great Lord Treasurer Burleigh, that England could never be ruined but by a parliament."[j]

It is obvious, that though this definition of municipal law, and this account of legislative authority be applied particularly to the law of England and the legislature of Great Britain; yet they are, in their terms and in their meaning, extended to every other state or nation whatever—"to every government, however it began, or by whatever right it subsists." Indeed, the opinion of Mr. Locke and other writers, "that there remains still inherent in the people a supreme power to remove and alter the legislature," is considered to be so merely theoretical, that "we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing."[k]

[f] 1. Bl. Com. 147. [g] Id. 160. [h] Id. 161.

[i] Id. 162. [j] Id. 161. [k] Id. 161.

The doctrines contained in the foregoing quotations from the Commentaries on the laws of England, may be comprised under the two general propositions, which follow. 1. That in every state, there is and must be a supreme, irresistible, absolute, uncontrolled authority, in which the rights of sovereignty reside. 2. That this authority, and these rights of sovereignty must reside in the legislature; because "sovereignty and legislature are convertible terms," and because "it is requisite to the very essence of a law, that it be made by the supreme power." In the first general proposition, I have the pleasure of agreeing entirely with Sir William Blackstone. Its truth rests on this broad and fundamental principle—that, by the constitutions of nature, men and nations are equal and free. In the second general proposition, I am under the necessity of differing altogether from the learned Author of the Commentaries. I differ from him, not only in the opinion, that the foregoing chain of reasoning must be applicable to every government and to every system of municipal law; I differ from him likewise in the opinion, that the foregoing chain of reasoning can be justly applied even to the government of Great Britain and to the municipal law of England. I think I can safely pledge myself to show, that, in both, I differ from him on the most solid and satisfactory grounds.

It deserves to be remarked, that, for his definition of municipal law, he cites the authority of no English court, nor of any English preceding writer, lawyer, or judge. Indeed, so far as I know, he could cite no such authority. So far as I have examined the English law books and authorities, upon this important subject—and I have examined them, as it has been my duty to do, with no small degree of attention—this definition stands entirely

unsupported in point of authority. I may, however, be mistaken—I pretend not to have read, far less to remember, every thing in the law. If I am mistaken, I will thank the friendly monitor, that will advise me of the mistake. As at present advised, I can say, that, so far as I know, this definition is unsupported by authority in the English law. I shall hereafter have occasion to show that, concerning acts of parliament, to which the definition is particularly applied, our law authorities hold, and even parliament itself holds, a very different language.

The introduction of the principle of superiority into the definition of law in general, we traced, when we examined that subject, from Sir William Blackstone to Baron Puffendorff. The introduction of the same principle into the definition of municipal law, can be traced to the same source. "Human laws," says he, "are nothing else, but the decrees of the supreme power, concerning matters to be observed by the subjects."[l] The celebrated Heineccius, in his system of Universal Law, gives a definition much to the same purpose—"Civil laws," says he, "are the commands of the supreme power in a state."[m] Why was this principle transplanted into the law of England?

It deserves to be further remarked, that, for all the strong sentiments and expressions concerning the necessary connexion, and indeed the convertibility of the sovereign and the legislative powers, no authority is produced from the English law; and—I speak under the guard as before—so far as I know, none could be

[l] Puff. 688. b. 7. c. 6. s. 3. [m] 2. Hein. s. 150. p. 152.

produced, except in one instance, of which I shall soon take notice. The observation, which I have already made with regard to the definition of municipal law, may, therefore, be applied, with equal propriety, to the necessary connexion between the sovereign and the legislative powers. This connexion is not attempted to be supported by authority in the English law. I excepted one instance. It is this—"The power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."[n] For this, the authority of my Lord Coke in his fourth Institute is quoted. I have examined the passage. It stands thus. "Of the power and jurisdiction of the parliament, *for making of laws in proceeding by bill*, it is so transcendent and absolute, as it cannot be confined, either for causes or persons, within any bounds."[o] From this authority, I think it may be fairly and justly inferred—that, by the British constitution, the legislative authority of that nation is, without any exception of causes or persons, vested in the British parliament. In the same manner, by the constitution of Pennsylvania, the legislative power of this commonwealth is vested in a general assembly. But can it be inferred from this authority, that the sovereign power of Great Britain is vested in her parliament? Can it be inferred from the constitution of Pennsylvania, that her sovereign power is vested in her general assembly? I think, therefore, I may now venture to say, that both in his definition of municipal law, and in his opinion concerning the convertibility of the legislative and the sovereign authority, Sir William Blackstone stands unsup-

[n] 1. Bl. Com. 160. [o] 4. Ins. 36.

ported by authority. Is he supported by reason and by principle? By neither, in my humble opinion.

The discussion of this question necessarily leads me to consider the establishment of government, and the division of its powers. That this subject may be fully understood,—for, in the United States, it ought to be understood fully—I shall examine the sentiments, which have been generally entertained and received concerning it, and then compare those sentiments with what I consider as the true state of things. No sooner is government mentioned, than the fine flattering images of power, dominion, and sovereignty dance in the fancy, as the beautiful and magnificent effects of its establishment. But the truth is, that sovereignty, dominion, and power are the parents, not the offspring of government. Let us, however, see what has been thought, and what ought to be thought, concerning those splendid objects.

The theory of the establishment of government has been generally such as I am about to explain.

It has been supposed, that, if a multitude of people, who had formerly lived independent of each other, wished to unite in a political society, and to establish a government, they would find it necessary to take the following steps. 1. Each individual would engage with all the others to join in one body, and to manage, with their joint powers and wills, whatever should regard their common preservation, security, and happiness. In consideration of this engagement, made by each individual with all the others, all those others would engage with each individual to protect and defend him from injury, and to secure him in the prosecution of

every just and laudable pursuit. These reciprocal engagements from each individual to all the others, and from all the others to each individual form the political association. Those who do not enter into them are not considered as a part of the society.

The society being formed, some measures must be taken in order to regulate its operations; otherwise it could never adopt or pursue a system of measures for promoting, jointly and effectually, the publick security and happiness. These measures involve the formation of government.

A third step, we are told, must also be taken, before government can be completed. In addition to the engagement of political association, another engagement must be made: to that engagement, there must be a new party. What he is—whence he comes—from what source his equal and independent powers of contracting originate, have never, to this moment, been explained. Such an account of him as I have received, I will give: if it is not satisfactory, you must not blame me. "This party is one or more persons, on whom the supreme authority is conferred," says one.[p] By another, we are told, that this party is one or more persons, on whom "the sovereignty is conferred."[q] The sovereignty or supreme authority! How has it started up all of a sudden? Why does it make its first appearance in a derivative state? Where do we find it originally?—for it must exist originally before it can be conferred. To these questions we receive no explicit answer. We are told at one time, that "there are, in each individual, the

[p] 2. Burl. 28. [q] Puff. 640. b. 7. c. 2. s. 8.

seeds, as it were, of the supreme power."[r] We are told, more cautiously, at another time, that the voluntary consent and subjection of the respective members of the society, is the "nearest and immediate cause, from which sovereign authority, as a moral quality, results."[s] But, to make the most of these different pieces of information, let us suppose that this cause will produce its proper effects; that these seeds will yield, in due time, their natural fruits; and that this conferred sovereignty existed originally in those who conferred it. What is this sovereignty? Is it divisible or indivisible? Was the whole or only a part of it conferred? Was it conferred unconditionally, or upon certain conditions? Was it conferred gratuitously, or for a valuable consideration? Why hear we nothing concerning these important steps, which, upon the opinion generally received, must have been taken previously to the complete formation of a government? This, I confess, is far from being satisfactory: let us, however, take it as it is; and proceed to the remaining step, which, we are told, is taken for the complete establishment of government. This is an engagement by those, who are to be the future governours, that they will consult most carefully and act most honestly for the common security and happiness; and a reciprocal engagement by those, who are, in future, to be governed, that they will observe fidelity and allegiance to those invested with the sovereign authority.

It is admitted not to be probable, that, in the formation of the several governments, these three steps have been actually and regularly taken; yet, we are told, in every just institution of power, there must have been

[r] 2. Burl. 42. [s] Puff. 654. b. 7. c. 3. s. 1.

such transactions as implicitly contain the full force and import of all of them.[t]

That the two first steps have been sometimes taken, and must be always supposed, in the regular structure of a government, I readily agree; because it is not easy to discover how a government could be formed without them. But with regard to the third, I see no necessity for it: I see no propriety in it: it is derogatory, in my humble judgment, from the genuine principles of legitimate sovereignty, and inconsistent with the best theory, and the best exercise too, of supreme power. But the full illustration of these dignified subjects is reserved for another place.

With regard, however, to the British constitution, we must allow the supposition, that a contract took place at its establishment. For this we have high political authority. A full assembly of the lords and commons, met in convention in the year 1688, declared that James the second had broke the original contract between the king and people.[u] What the terms of that contract were, at what time it was made, and what duties it enjoined, have been subjects of dark and doubtful disputation. For this reason, as we are told by Sir William Blackstone, it was, after the revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised, by weak and scrupulous minds, about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who has reigned since that revolution.[v]

[t] 2. Hutch. 227. [u] 1. Bl. Com. 211. 212. [v] Id. 233.

But, after all, what will this prove with regard to the supreme power of parliament? Do we hear, in the British constitution, of any contract between *them* and the people? How came *they* to be invested with such immense authority? The usual theories of government support no hypothesis of this kind, even in favour of the British legislature; far less, in favour of the legislature of every other government, "however formed, or by whatever right subsisting."

Let us trace this matter a little farther: let us endeavour to form some just conceptions concerning this supreme and sovereign power, concerning which so much has been said, and concerning which so little has been said justly. Let us turn our eyes, for a while, from books and systems: let us fix them upon men and things. While those, who were about to form a society, continued separate and independent men, they possessed separate and independent powers and rights. When the society was formed, it possessed jointly all the previously separate and independent powers and rights of the individuals who formed it, and all the other powers and rights, which result from the social union. The aggregate of these powers and these rights composes the sovereignty of the society or nation. In the society or nation this sovereignty originally exists. For whose benefit does it exist? For the benefit of the society or nation. Is it necessary for the benefit of the society or nation, that, the moment it exists, it should be transferred?—This question ought, undoubtedly, to be seriously considered, and, on the most solid grounds, to be resolved in the affirmative, before the transfer is made. Has this ever been done? Has it ever been evinced, by unanswerable arguments, that it is necessary to the benefit of a society

to transfer all those rights and powers, and the results of all those rights and powers, which the members once possessed separately, but which the society now possess jointly? I think such a position has never been evinced to be true. Those powers and rights were, I think, collected to be exercised and enjoyed, not to be alienated and lost. All these powers and rights, indeed, cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation. One of those powers and rights is to make laws for the government of the nation. This power and right may be delegated for a certain period, on certain conditions, under certain limitations, and to a certain number of persons. I ask—Is it necessary that, along with this power and this right, all the other powers and rights of the nation should be delegated to the same persons? I ask farther—is it necessary, that all those other powers and rights should be delegated without any right of resumption?—Another of those powers and rights is that of carrying the laws into execution. May not the society delegate this right for another period, on other conditions, with other limitations, and to other persons? A third right and power of the society is that of administering justice under the laws. May not this right be delegated for still another period, on still other conditions, under still other limitations, and to still other persons? Or may not this power and right be partly delegated and partly retained in personal exercise? For, in the most extended communities, an important part of the administration of justice may be discharged by the people themselves. All this certainly may be done. All this certainly has been done, as I shall have the pleasure of showing, when I come to examine the American governments, and to point out, by an enumeration and compa-

rison of particulars, how beautifully, how regularly, and how usefully we have established, by our practice in this country, principles concerning the reservation, the distribution, the arrangement, the direction, and the uses of publick authority, of which even the just theory is still unknown in other nations.

Let us now pause and reflect. After what we see can be done, after what we see has been done, in the delegation and distribution of the rights and powers of society; can we subscribe to the doctrine of the Commentaries—that the authority, which is legislative must be *supreme?* Can we consent, that this doctrine should form a first principle in our system of municipal law? Certainly not. This definition is not calculated for the meridian of the United States.

I go farther—It is not calculated for the meridian of Great Britain. In order to show this, as it ought to be shown, it will be necessary to enter into a disquisition concerning the component parts and powers of the British parliament, and the origin, kinds, and properties of the English municipal law; the greatest and best proportion of which was never made by a parliament at all.

The British parliament consists of three distinct branches; the king, the house of lords, and the house of commons. To that species of English law, which is called a statute, the assent of all the three branches is necessary. When it has received the assent of all the three, it becomes a law and is obligatory upon the nation; but it is obligatory upon different parts of it for different reasons. "An act of parliament," says my Lord Hale, "is made, as it were, a tripartite indenture, between

the king, the lords, and commons; for without the concurrent consent of all those three parts of the legislature, no such law is or can be made."[w] What is an indenture? The Commentaries will tell us, that it is a species of deed, to which there are more parties than one.[x] What is the first requisite of a deed? The Commentaries will also tell us, "that there be persons able to contract, and be contracted with."[y] If a deed is a contract or agreement; if an indenture is a species of deed, to which there are more parties than one; if an act of parliament may be called an indenture tripartite, because there are three parties to it—the king, the lords, and the commons; we find, that an act, which, considered indistinctly and dignified by the name of law, requires the whole supreme power of the nation to give it birth, is, when viewed more closely and analyzed into the component parts of its authority, properly arranged under the class of contracts. It is a contract, to which there are three parties; those, who constitute one of the three parties, not acting even in publick characters. A peer represents no one; he votes for himself; and when he is absent, he may transfer his right of voting to another. This may be thought a very free way of treating what is represented as necessarily an emanation of sovereign authority; but it is treating it truly; and give me leave to add, it is treating it accurately. Besides; I shall not be ashamed of treading in a path, though even a foot path, to which I am directed by the finger of the enlightened Lord Hale. That path, to which he points, will lead to instruction. Let us pursue it—To this indenture there are three parties: to an indenture the power of contracting in each of the parties is necessary. What is the power

[w] Hale's Hist. 2 [x] 2. Bl. Com. 295. [y] Id. 296.

of contracting in the different parts? The king contracts for himself, and as representing the executive authority of the nation. The peers engage in their private and personal rights. The members of the house of commons bind themselves and those whom they represent. They represent, or are supposed—how justly is immaterial to our present argument—to represent "all the commons of the whole realm."[z] We all know, that one may execute an instrument, either in person, or by an attorney: we all know that an instrument may be executed by a person in his own right and as attorney also. Perhaps it would not be improper if, on some occasions at least, the forms, as well as the principles, of private, were copied into publick, transactions. Permit me to mention an instance, in which this was lately done. In the ratification of the constitution of the United States by the convention of Pennsylvania, the distinct characters, in which the members of that convention acted, are distinctly marked. "We the delegates of the people of the commonwealth of Pennsylvania, in general convention assembled, do, in the name and by the authority of the same people, and for ourselves, assent to and ratify the foregoing constitution for the United States of America."

The foregoing, though a very familiar, must, I think, be admitted to be a very intelligible and satisfactory illustration and analysis of the manner, in which acts of parliament are made and become obligatory. For my own part, I cannot conceive how the truth, or the real dignity of a subject, can suffer by being closely inspected. When the exclamation—procul este—is made, I am led

[z] 4. Ins. 1.

to suspect, that a secret conscious want of dignity or integrity is the cause. The plain and simple analysis, which I have given, of the nature and obligation of acts of parliament is evidently countenanced by the expressive legal language of my Lord Hale—It is supported and confirmed by the very respectable authority of my Lord Hardwicke. "The binding force—" I use his very words, as they are reported—"the binding force of these acts of parliament arises from that prerogative, which is in the king, as our sovereign liege lord; from that personal right, which is inherent in the peers and lords of parliament to bind themselves and their heirs and successours in their honours and dignities; and from the delegated power vested in the commons, as the representatives of the people; and, therefore, Lord Coke says, 4. Inst. 1. these represent the whole commons of the realm, and are trusted for them. By reason of this representation, every man is said to be a party to, and the consent of every subject is involved in, an act of parliament."[a] "Every man in England," says the Author of the Commentaries himself, "is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives."[b] What is there in all this, that necessarily implies the irresistible energy of power, which is sovereign and supreme, without limits and without control?

We have already seen all the parties to an act of parliament. Let us, again, take a deliberate and distinct view of them: where shall we find the sovereign and supreme power? In the king? It is true, that he is called by my Lord Hardwicke "sovereign liege lord," and

[a] 2. Atk. 654. [b] 1. Bl. Com. 185.

that his prerogative, as such, is assigned, and with much propriety, as one of the sources, from which "the binding force of acts of parliament arises." The legal and constitutional import of the expressions, sovereign liege lord, is well known. They present the king to his subjects as the object of their allegiance: they present him to foreigners as exercising the whole authority of the nation in foreign transactions. To foreign transactions, the British parliament is no party: to foreign nations, the British parliament is totally unknown. Alliances, treaties of peace, even declarations of war, are made in the name, and by the constitutional authority, of the king alone. But, it has never been pretended, that the prerogative of the king, as sovereign liege lord, extended so far as to bind his subjects by his laws. Even Henry the eighth, tyrant as he was, knew that an act of parliament was necessary, if even that could be sufficient, to endow his proclamations with legal obligatory force. But the king, by assenting to an act of parliament, can bind himself; and he can bind all that portion of the sovereign power of the nation, which is intrusted to his management and care. And it is certainly proper, that, as he represents the executive and the foreign powers of the nation, he should be consulted in the making of the national laws. From this short and clear deduction, we evidently see, that the absolute, uncontrolled power, mentioned by Sir William Blackstone as inseparable from legislative authority, is not to be found in the king. Is it to be found in the house of lords? That will not be pretended. Their votes bind not a single person in the nation, except themselves and the heirs and successours of their honours and dignities. Let us go to the house of commons: is this supreme power, which elsewhere we have searched for in vain, to be found among the mem-

bers of this house? In what character? In their own right? This will not be alleged. As representatives? As representatives, they act, not by their own power, but by the power of those whom they represent. This power, therefore, whatever it is, cannot be found among the members of the house of commons, it must be looked for among their constituents. There, indeed, we shall find it: and the moment we find it, we shall discover its nature and extent. The king and the commons assembled in parliament are invested by the whole nation, except the house of lords, who act in their own right, not with "transcendent and absolute power and jurisdiction" *generally*, as one would naturally conclude from the unqualified expressions of Sir William Blackstone; but with this "transcendent and absolute power and jurisdiction for the *making of laws*," as we find in the determinate language of my Lord Coke. To the making of laws, this power and jurisdiction of the British parliament is strictly and rigidly confined. A single law the British parliament cannot execute: in a single cause, the British parliament cannot administer justice. Why then should "absolute despotick power," to use the language of the Commentaries, be ascribed to the British parliament? Has this doctrine a solid foundation? I presume it has not. But though it has not a solid foundation, it has produced, as I shall hereafter show, the most pernicious effects. I will acknowledge freely, that the bounds, which circumscribe the authority of the British parliament, are not sufficiently accurate: I will acknowledge farther, that they are not sufficiently strong. But can this suggest a reason or a motive for denying their existence? It strongly suggests, indeed, reasons and motives of a very different kind. It suggests the strongest reasons and motives for cir-

cumscribing the authority of the British parliament by limits more accurate, for fortifying those limits with an additional degree of strength, and for rendering the practice more conformable than it now is, to the theory of its institution—for rendering the house of commons in fact, what it is presumed to be in law, "a representation of all the commons of the whole realm." If any thing coming from this chair could be supposed, by possibility, to produce the smallest effect in that nation, I would warmly recommend to it the accomplishment of those great objects, as consummations most devoutly to be wished. The maxim of the great Lord Burleigh has prevailed long enough: let it make way for a better. Instead of saying, that "England can never be ruined but by a parliament;" let it be said, and truly said, that "England can never be ruined but by herself."

The learned Author of the Commentaries distinguishes between a law and a counsel; and also between a law and an agreement. I will examine the principle of these distinctions, in order that its strength or weakness may appear. It will be necessary to mention what is said in the Commentaries upon this subject. "Municipal law is called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge of the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion; law is matter of injunction: counsel acts only upon the willing; law upon the unwilling also.

"It is also called a *rule*, to distinguish it from a *compact* or *agreement:* for a compact is a promise proceed-

ing *from* us; law is a command directed *to* us. The language of a compact is, 'I will, or will not, do this;' that of a law is, 'thou shalt, or shalt not, do this.' It is true, that there is an obligation, which a compact carries with it, equal, in point of conscience, to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act, without ourselves determining or promising any thing at all."[c]

The examination of the principle, which lies at the root of these distinctions, is an interesting subject indeed. If these distinctions can be supported, we may bid a last adieu to the maxim which I have always deemed of prime importance in the science of government and human laws—a free people are governed by laws, of which they approve. Before we part from this darling position, let us, at least, cast behind us, a "longing, lingering look."

Upon these passages in the Commentaries, I make remarks similar to those, which I made upon the passages examined some time ago. No authority in the English law is adduced—none, so far as I know, could be adduced to support them. These sentiments concerning law, as well as the definitions of municipal law, and law in general, may be traced to the performance of Baron Puffendorff. Let us see what this performance says. "*Law* differs from *counsel* in this, that by the latter a man"—"has no proper power, so as to lay any direct obligation on another; but must leave it to his pleasure and choice whether he will follow the counsel

[c] 1. Bl. Com. 44. 45.

or not." "But law, though it ought not to want its reasons, yet these reasons are not the cause why obedience is paid to it, but the power of the exacter, who, when he has signified his pleasure, lays an obligation on the subject to act in conformity to his decree." "We obey laws, not principally on account of the matter of them, but upon account of the legislator's will. And thus law is the injunction of him, who has a power over those, to whom he prescribes; but counsel comes from him, who has no such power." "Counsel is only given to those, who are willing to have it; but law reaches the unwilling."[d]

"Neither are those ancients accurate enough in their expressions, who frequently apply to laws the name of *common agreements*." "The points of distinction between a compact or covenant and a law, are obvious. For a *compact* is a *promise*, but a *law* is a *command*. In *compacts*, the form of speaking is, I will do so and so; but in *laws*, the form runs, do thou so, after an imperative manner. In *compacts*, since they depend, as to their original, on our will, we first determine what is to be done, before we are obliged to do it; but in *laws*, which suppose the power of others over us, we are, in the first place, obliged to act, and afterwards the manner of acting is determined. And, therefore, he is not bound by a *compact*, who did not freely tie himself by giving his consent: but we are, for this reason, obliged by a *law*; because we owed an antecedent obedience to its author."[e]

You now see, that these distinctions between a law and an agreement, a law and a compact are adopted from

[d] Puff. 58. 59. b. 1. c. 6. s. 1. [e] Puff. 59. b. 1. c. 6. s. 2.

Baron Puffendorff: whence he derived them, it is immaterial to inquire. But it is material to show, as I think I can do unanswerably, that these distinctions, if they could be supported, would overturn the beautiful temple of liberty from its very foundations. It is material also to show, as I think I can do unanswerably, that the fair temple of liberty stands unshaken and undefaced; and that the sole legitimate principle of obedience to human laws is human consent. This consent may be authenticated in different ways: in its different stages of existence, it may assume different names—approbation—ratification—experience: but in all its different shapes—under all its different appellations, it may easily be resolved into this proposition, simple, natural, and just—All human laws should be founded on the consent of those, who obey them. This great principle I shall, in the course of these lectures, have occasion to follow in a thousand agreeable directions. My present business, while I examine the principles of municipal law as delivered in the Commentaries, is to apply them and the examination of them to the law of England. In that law, we shall find the stream of authority running, from the most early periods, uniform and strong in the direction of the principle of consent—consent, given originally—consent, given in the form of ratification—and, what is most satisfactory of all, consent given after long, approved, and uninterrupted experience. This last, I think, is the principle of the common law. It is the most salutary principle of obedience to human laws, that ever was diffused among men. With such a Byzantium before him, is it not astonishing, indeed, that the attention—must I say the attachment?—of Sir William Blackstone should have been attracted towards a Chalcedon?[f]

[f] 3. Gibbon. 6. 7. Tac. Ann. XII. 62.

The ancient coronation oath of the kings of England obliged them, to the utmost of their power, to cause those laws to be observed, "which the men of the people have made and chosen."[g]

Let us next pay the respect, which is due to the celebrated sentiment of the English Justinian, Edward the first. "Lex justissima, ut quod omnes tangit, ab omnibus approbetur." It is a most just law, that what affects all should be approved by all. This golden rule is, with great propriety, inserted in his summons to his parliament. The Lord Chancellor Fortescue, in his most excellent tractate concerning the English laws, informs his royal pupil, that the statutes of England are framed, not by the will of the prince, but by that and by the assent of the whole kingdom. "Angliæ statuta, nedum principis voluntate, sed et totius regni assensu, ipsa conduntur." And if a statute, though passed with the greatest caution and solemnity, should be found, on experience, not to reach those purposes, which were intended by its framers, it can soon be reformed; but not without the same assent of the peers and commonalty of the kingdom, from which it originally flowed. "Et si statuta hæc, tanta solennitate et prudentia edita, efficaciæ tantæ, quantæ conditorum cupiebat intentio, non esse contingant, correcto reformari ipsa possunt; et non sine communitatis et procerum regni illius assensu, quali ipsa primitus emanarunt."[h] "To an act of law, statute or common, every man," says Lord Chief Justice Vaughan, "is as much consenting, and more solemnly, than he is

[g] 1. Bl. Com. 236, note. "que lez gentez du people avont faitez et esliez."

[h] Fortes. c. 18.

to his own private deed."[i] Authorities to the same purpose might, without end, be heaped upon authorities from the law books. I forbear to trouble you with any more of them. Let us have recourse to what I may properly call a perpetually standing authority upon this very important subject—the writ for choosing members of parliament. It commands the sheriff of each county to cause two knights, the most fit and discreet of the county, and two citizens from every city, and two burgesses from every borough within the county, to be chosen according to law—"So that the said knights have full and sufficient power for themselves,[j] and the commonalty of the said county, and the said citizens and burgesses for themselves and the commonalty[k] of the said cities and boroughs, severally from them, to do and consent to those things, which, by the favour of God, shall happen to be ordained by the common council of the kingdom: so that for default of such power, or through improvident election of the said knights, citizens,

[i] Vaugh. 392.

[j] It is the wisdom of the English law, that acts of parliament are equally binding to the makers of them as to the rest of the people. The makers are empowered for themselves, as well as for their constituents; and themselves, as well as their constituents must taste the sweet or bitter fruits of their own works. This suggests a powerful motive for caution and justice in their determinations. (2. Whitlocke 87.) But this doctrine ill agrees with the new and foreign theory, introduced into the Commentaries—"A law always supposes some superiour, who is to make it." 1. Bl. Com. 43.

[k] It is a great trust reposed in members of parliament, to have the power of the whole commonalty of a county, or city, or borough conferred on them. The acts of the members are the acts of the commonalty, from whom they have their power, and who are bound by them. 2. Whitlocke 89.

or burgesses, the said affairs remain not undone."[1] Can language be more explicit to show the principle, upon which acts of parliament must be made, and consequently the principle, upon which alone they ought to be obeyed? It is directed, that the members have full and sufficient powers *for themselves*, and for their constituents *from their constituents*. This is precisely according to the analysis, which we have already given of the power of parliament. Why are those powers necessary? To do and *consent* to those things, which shall be ordained by parliament. Those powers are absolutely necessary; for, without them, the business of the nation would remain undone. Is it possible, that any one, who has ever seen this venerable and authentick legal instrument, could suppose, that the sovereign power of the nation was vested in the parliament of Great Britain? Is it possible, that one who has seen this writ could forget the rock, from which the members were hewn, and the hole of the pit from which they were dug? The humble servants, who must come furnished with "full and sufficient power from" their masters "the commonalty of the county, and the burgesses and the citizens separately—" "*Divisim*," one by one—have those humble servants, when assembled together, the uncontrolled powers of the nation in their hands? When they are intrusted with the legislative, may they, therefore, assume also the executive and the judicial powers of their country?

We now see, in a very striking point of view, the strong and expressive import of the language of my Lord Hale, when he says, that an act of parliament is,

[1] 1. Whitlocke 2. 3.

as it were, a tripartite indenture, between the king, the lords, and the commons. They form three parties: each party has power to contract. The king contracts in his own right—for the king is also a man—and in consequence of the powers devolved on him by that original contract, long supposed, but, at the revolution of 1688, expressly recognized to have been made between him and the people. The lords of parliament contract solely in their own right. The members of the house of commons contract in their own right, for themselves, and in right of their constituents, for the commonalty of the whole realm. Thus we find every party and every power to form a contract, a compact, or an agreement—for these terms are synonimous—in the strictest and most proper sense of the words. The vital principle of every contract is the consent of the mind. My Lord Hale did not draw the obligatory principle of an act of parliament from a foreign fountain: he drew it, pure and clear, from its native springs.

Sir William Blackstone tells us, that the original of the obligation, which a compact carries with it, is different from that of a law. The original of the obligation of a compact we know to be consent: the original of the obligation of an act of parliament we have traced minutely to the very same source.

But acts of parliament are not the only—let us add, they are not the principal—species of law, known and obligatory in England. That kingdom boasts in the common law. In the countenance of that law, every lovely feature beams consent. This law is of vast importance. By it, the proceedings and decisions of courts of justice are regulated and directed. It guides the

course of descents and successions to real estates, and limits their extent and qualifications: it appoints the forms and solemnities of acquiring, of securing, and of transferring property: it prescribes the manner and the obligation of contracts: it establishes the rules, by which contracts, wills, deeds, and even acts of parliament are interpreted.[m] This law is founded on long and general custom. A custom, that has been long and generally observed, necessarily carries with it intrinsick evidence of consent. Caution and prudence are universally recommended in the introduction of new laws: can caution and prudence be so strongly exemplified—can their fruits be so certainly reaped in any other laws, as in those that are established by custom? The prospect of convenience invites to the first experiment: a first experiment, successful, encourages to make a second. The successful experiments of one man or one body of men induce another man or another body of men to venture upon similar trials. The instances are multiplied and extended, till, at length, the custom becomes universal and established. Can a law be made in a manner more eligible? Experience, the faithful guide of life and business, attends it in its every step. Other laws demand to be taken upon trust: a good countenance is their only recommendation. Those, who introduce them, can only say, in their favour, that they look well. A customary law, with a modesty appropriate to conscious merit, asks for admittance only upon trial, and claims not to be considered as a part of the political family, till she can establish a character, founded on a long and intimate acquaintance. The same means, by which the character of one law is known and approved, are employed to try

[m] Hale's Hist. 24.

and discriminate the character of every other. In favour of every one that is recommended, it can be said, not only, that it has lived unexceptionably by itself, but also that it has lived in peace and harmony with all the others. In this manner, a system of approved and concording laws is gradually, though slowly, collected and formed. By a process of this kind, the immortal Newton collected, arranged, and formed his just and beautiful system of experimental philosophy. By the same kind of process, our predecessors and ancestors have collected, arranged, and formed a system of experimental law, equally just, equally beautiful, and, important as Newton's system is, far more important still. This system has stood the test of numerous ages: to every age it has disclosed new beauties and new truths. In improvement, it is yet progressive; and what has been said poetically on another occasion, may be said in the strictest form of asseveration on this,—it acquires strength in its progress. From this system, we derive our dearest birthright and richest inheritance. The rise, the progress, the history, and the component parts of this invaluable system; its extension to America, and the principles of its establishment in the several states and in the national government, it will be my duty and my pleasure to trace and to exhibit in the course of these lectures. My present business is, to ascertain the origin of its obligatory force. Surely, this may be done with ease. The common law is founded on long and general custom. On what can long and general custom be founded? Unquestionably, on nothing else, but free and voluntary *consent*. The regions of custom afford a most secure asylum from the operations of absolute, despotick power. To the cautious, circumspect, gradual, and tedious probation, which a law, originating from

custom, must undergo, a law darted from compulsion will never submit.

"Sic volo, sic jubeo, stet pro ratione voluntas," is the motto of edicts, proclaimed, in thunder, by the voice of a human superiour. Far dissimilar are the sentiments expressed in calm and placid accents by a customary law. I never intruded upon you: I was invited upon trial: this trial has been had: you have long known me: you have long approved me: shall I now obtain an establishment in your family? A customary law carries with it the most unquestionable proofs of freedom in the country, which is happy enough to be the place of its abode.

Some truths are too plain to be proved. That a law, which has been established by long and general custom, must have received its origin and introduction from free and voluntary consent, is a position that must be evident to every one, who understands the force and meaning of the terms, in which it is expressed. My object is to imprint, as well as to prove, this great political doctrine. Perhaps this cannot be done better, than by laying before you the sentiments, which an English parliament held upon this subject, above two hundred years ago. You will see how strongly they support the principle—that the obligation of human laws arises from consent. The sentiments were expressed on an occasion similar to one, which will still suggest matter of very interesting recollection to many minds—They were expressed when an attempt was made to establish, in England, a foreign jurisdiction. With becoming indignation against it, the parliament declare—"This realm is free from subjection to any man's laws, but only to such as have been devised, made, and obtained within this realm, for the wealth of

the same, or to such as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, with their *own consent* to be used amongst them, and have *bound themselves* by *long use and custom* to the observance of the same, not as to the observance of laws of any foreign prince, potentate, or prelate, but as to the customed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and customs, and none otherwise."[n]

Some writers, when they describe that usage, which is the foundation of common law, characterize it by the epithet *immemorial*. The parliamentary description is not so strong. "Long use and custom" is assigned as the criterion of law, "taken by the people at their free liberty, and by their own consent." And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.

That consent is the probable principle of the common law, is admitted by the Author of the Commentaries himself. "It is one of the characteristick marks of English liberty," says he,[o] "that our common law depends upon custom, which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people." I search not for contradictions: I wish to reconcile what is seemingly contradictory. But, if the common law could be introduced, as it is admitted it probably was, by the voluntary consent of the people; I confess I can not reconcile with this—certainly a solid—principle, the principle that

[n] St. 25. H. 8. c. 21. s. 1. [o] 1. Bl. Com. 74.

"A law always supposes some superiour, who is to make it," nor another principle, that "sovereignty and legislature are indeed convertible terms."

A power, far beneath the sovereign power, may be invested with legislative authority; and its laws may be as obligatory as any other human laws. Of this, instances occur even in the government of Great-Britain.

It is necessarily and inseparably incident to all corporations, to make by-laws, or private statutes, for their government. These laws are binding upon themselves, unless contrary to the laws of the land, and then they are void.[p] From these positions, we clearly infer, that laws, obligatory upon those for whom they are made, may be enacted by a power, so far from being absolute and supreme, that its laws are void, when contrary to those enacted by a superiour power: so far do sovereignty and legislature, in this instance at least, appear to be from convertible terms: so far is it from being requisite to the very essence of a law, that it be made by the supreme power. Sir William Blackstone tells us, that in the provincial establishments in America, the assemblies had the power of making local ordinances; that subordinate powers of legislation subsisted in the proprietary governments; and that, in the charter governments, the assemblies made laws, suited to their own emergencies:[q] and yet, in these instances, he certainly did not admit, that "by sovereign power is meant the making of laws."

I hope I have now shown, that the definition of municipal law in the Commentaries is not calculated even for

[p] 1. Bl. Com. 475. [q] 1. Bl. Com. 108.

the meridian of Great-Britain: it is still less calculated for that of many other governments: for, in many other governments, the distinction is still more strongly marked between the sovereign and legislative powers.

In the original constitution of Rome, the sovereign power, the *dominium eminens*, as it is called by the civilians, always resided in the collective body of the people. But the laws of Rome were not always made by that collective body. To the senate was indulged a privilege of legislation; partial and subordinate, it is true; but still a privilege of legislation. An act of the senate was not considered as a permanent law; but it was allowed to continue in force for one year; not longer, unless it was ratified by the people. To the plebeians, exclusive of the senators and patricians, a privilege of legislation was also indulged; but their laws bound only themselves. While we are taking notice of the different bodies, that possessed the power of legislation in Rome, it is proper to mention one very great defect, which existed in the constitution of that celebrated republick. A power, inferiour to that which made a law, could dispense with it. The senate, by its own decree, could dispense with a law, made by the whole collective body of the people. This power, dangerous in every free government, was often exercised, in Rome, to accomplish the most pernicious purposes.[r]

In the United States, and in each of the commonwealths, of which the union is composed, the legislative

[r] In the government of Media, an opposite extreme prevailed. When an edict was once published, it was not in the power of the legislator to alter or repeal it. The same power, which is sufficient to make, should be sufficient to abrogate a law. 3. Gog. Or. Laws. 11.

is very different from the supreme power. Instead of being uncontrollable, the legislative authority is placed, as it ought to be, under just and strict control. The effects of its extravagancies may be prevented, sometimes by the executive, sometimes by the judicial authority of the governments; sometimes even by a private citizen, and, at all times, by the superintending power of the people at large. These different points will afterwards receive a particular explication. At present, perhaps, this general position may be hazarded—That whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge: he must, it is true, abide by the consequences of a wrong judgment.

Puffendorff, from whom the idea of a superiour, as forming a necessary ingredient in the idea of law, seems to have been transplanted into the Commentaries, insists much upon what he calls a maxim—*that a person cannot oblige himself*; "and this maxim," he tells us, "is not confined to single men, but extends to whole bodies and societies:"[s] "for a person to oblige himself under the notion of a lawgiver, or of a superiour, is an impossibility."[t] Hence the inference seems to be drawn, that "obligations are laid on human minds by a superiour." To different minds, the same things, sometimes, appear in a very different manner. If I was to make a maxim upon this subject, it would be precisely the reverse of the maxim of Baron Puffendorff. Instead of saying, that a man cannot oblige himself; I would say, that no

[s] Puff. 63. b. 1. c. 6. s. 7. [t] Id. 688. b. 7. c. 6. s. 2.

other person upon earth can oblige him, but that he certainly can oblige himself. Consent is the sole principle, on which any claim, in consequence of human authority, can be made upon one man by another. I say, in consequence of human authority; for, in consequence of the divine authority, numerous are the claims that we are reciprocally entitled to make, numerous are the duties, that we are reciprocally obliged to perform. But none of these can enter into the present question. We speak of authority merely human. Exclusively of the duties required by the law of nature, I can conceive of no claim, that one man can make upon another, but in consequence of his own consent. Let us, upon this occasion, as we have done upon some others, simplify the object by a plain and distinct analysis. Let us take for the subject of our analysis the very question we are upon —Whether a man can be bound by any human authority, except his own consent? Let us suppose, that one demands obedience from me to a certain injunction, which he calls a law, by performing some service pointed out to me: I ask him, why am I obliged to obey it? He says it is just I should do it. Justice, I tell him, is a part of the law of nature; give me a reason drawn from human authority. He tells me, he had promised it. Very well, perform your promise. Suppose he rises in his tone, and tells me, he orders it. Equal and free, I see no reason for obeying the order of one, who is only equal and free. Repelled from this attack upon my independence, he assails me on a very different quarter; and, softening his accents, represents how generous, nay how humane, it would be, to do as he desires. Humanity is a duty; generosity is a virtue; but neither is to be referred to human authority. Let invention be put upon the rack, and the severest torture will not draw

from it a discovery of any external human authority, by which I am obliged to obey the supposed law, or to perform the supposed service. He tells me, next, that I promised to do it. Now, indeed, I discover a human source of obligation. If I promised to do it, I am bound to do it; unless the promise is either unlawful, or discharged; dissolved by an equal, or prohibited by a superiour authority. But this promise originated from consent; for if it was the abortion of compulsion—the effect sometimes of exterior and superiour human *power*, but never of human *authority*—I am not bound to consider it as my act and deed.

Let us now vary the supposition a little. Suppose this demand to be made upon me by one, of whose superiour judgment and unimpeached veracity I had the strongest and best founded belief: suppose me at that period of life—for there is such a period of life—when I should believe implicitly whatever was taught me by one, whom I knew I could so well trust: suppose this person, respected for his knowledge and integrity, should tell me, that he really thought it my duty to comply with the demand. I think I should probably feel a sense of obligation arise within me. But why? because this respectable person says it? No. But for a reason, which may be easily mistaken for this: because I believe, that what this respected person says must be true. Here, indeed, is a species of external human authority, exerted and obeyed for the wisest purposes: But this is very different from that external human authority, which is assigned by some as the source of obligation in human laws. This species of authority is said to have been carried to a very great height by Pythagoras, the celebrated philosopher. He delivered it as a maxim, and

it was received as such in his school, that whatever he said must be true. *Ipse dixit* was an undisputed authority. But if folly and falsehood had been as inseparably associated with the character of Pythagoras, as veracity and wisdom were, in the minds of his followers, I ask—would his *ipse dixit* have been received as an undisputed authority? I presume not. To recur, then, to the supposition, which I last made; I should feel the sense of obligation arise in me, not because I should think it his will, that I should comply with the demand; but because I should believe in his opinion, that it was my duty to do so. This refers to a very different source. For let me suppose a little farther, that, after feeling this sense of obligation arise within me, I should come to learn, either from my own observation, or from authority still superiour to that of the person in whom I placed confidence, that this confidence was misplaced; that what he told me proceeded either from mistake, or from something worse than mistake; his will might continue the same, and my opinion concerning it might continue the same, but my sense of obligation would be greatly altered. These remarks, I hope, will be sufficient to show, that no exterior human authority can bind a free and independent man.

The next question is—can a man bind himself? Baron Puffendorff lays it down as a maxim, that he cannot: and on this maxim, applied to publick bodies as well as private individuals, he builds a very interesting series of argumentation—just, indeed, and unanswerable, if the basis, on which it rests, be solid and sound.

We have, at last, reached the bottom of the business. We are now come to the important question, the resolu-

tion of which must, in my opinion, decide the fate of all human laws. I say, in my opinion; for I have already given my reasons for thinking, that if a man cannot bind himself, no human authority can bind him. For one man, equal and free, cannot be bound by another, who is no more. The consequence necessarily is, that if a man can be bound by any human authority, it must be by himself. A farther consequence necessarily is, that if he cannot bind himself, there is an end of all human authority, and of all human laws. How differently, sometimes, things turn out, from what was expected from them! The idea of superiority, it was probably thought, would strengthen the obligation of human laws. When traced minutely and accurately, we find, that it would destroy their very existence. If no human law can be made without a superiour; no human law can ever be made.

First principles ought to be admitted with caution indeed. When you first read, in the Commentaries, this principle—"a law always supposes some superiour, who is to make it;" you did not suspect, I presume, that this principle is subversive of all human laws. You now perceive, that, if a man can be bound by human authority, it must be by his own. But is he his own superiour? The creative imagination of a Theobald himself could not suggest the fancy. He could only go so far as to say

> "None but himself can be his *parallel*."

Even the master of a show, who boasted, that his elephant was "the greatest elephant in the world," thought it necessary, for preventing mistakes, to add—except himself.

But to resume seriously the important question—can a man bind himself? Simple facts have sometimes led to the greatest discoveries. The sublime theory of gravitation was first suggested to Newton by an apple falling from a tree.

At the end of the second volume of the Commentaries are precedents of some useful instruments, known to the law of England. Among others, there is a precedent of a common bond. In that bond, there are these words written—*I bind myself.* This form of a bond has been known and used and approved in England from time immemorial. If a man cannot bind himself, then all the bonds, which have been executed in England, have been mere nullities. The substantial parts of that bond are parts of the common law of England. The part, which I have mentioned, is certainly a most substantial one. All parts of the precedent are not substantial: many of them may be omitted or altered without vitiating the force of the bond. The law does not require any particular form of words: but one thing it strictly requires—such words as declare the intention of the party, and denote his being bound: such words will be sufficient: such words will be carried into effect by the judgment of the law.

Let us examine the obligatory principle of a bond by legal tests, by triers at the common law. Suppose one applies to a court of justice to enforce the obligation of a bond, and proposes it as the foundation of his demand. In what manner is he directed by the law to express the legal import of the instrument? He is directed to declare, that, by this instrument, the party who executed

it, "acknowledged himself to be bound,"[u] or "bound himself."[v] The precedents are in both forms. When the action is properly instituted, the party, against whom it is instituted, is next called upon, with all legal solemnity, to make his defence—for against no man ought a decision to be pronounced till he has an opportunity of being heard. He appears: the instrument is produced. What can he say, why a decision should not be pronounced against him? The common law furnishes him with forms to suit almost every case, certainly every case that has been brought before a court of justice. If the case of the present defendant is so very peculiar, that nothing similar to it ever happened before; the common law will protect him in forming a defence, suited to his very peculiar case. Among all the different kinds of pleas, fitted for every case that has happened, for almost every case that can happen, are there any furnished, which bear towards this principle—that the defendant could not oblige himself? There are. But they are furnished only for those, who, by reason of their infancy, or any other cause, appear to want a common degree of understanding. For without understanding it, no obligation can be legitimately formed. There are others too, that respect another situation, which it will be proper to examine particularly; because it is probable, that it will throw much light upon the principle of obligation to human laws. The understanding, though necessary, is not, of itself, sufficient to form a legitimate obligation: in a legitimate obligation, the *will* must concur; compulsion will not be received as a substitute for consent. The common law is a law of liberty. The defendant may plead, that he was compelled to execute the instrument.

[u] Boh. Ins. Leg. 102. [v] 2. Mod. Ent. 178.

He cannot, indeed, deny the execution of it; but he can state, in his plea, the circumstances of compulsion attending its execution;[w] and these circumstances, if sufficient in law, and established in fact, will procure a decision in his favour, that, in such circumstances, he did not bind himself. If he never executed the instrument at all; he can state the fact; and unless the execution of it be proved against him, he will, upon this plea likewise, obtain a decision, that he did not bind himself. But if he can do none of these things—if he executed the instrument; if he executed it voluntarily; if he executed it knowingly; the law will pronounce, that he bound himself. This has been the regular course of the law during time immemorial—a course, uninterrupted and unrepealed. In the municipal law of England, therefore, the doctrine is established—that a man can bind himself. This doctrine is established by strict legal inference from the principles and the practice of the common law. The consequence is, that, on the principles of the municipal law of England, a superiour is not necessary to the existence of obligation. A man can bind himself. But is his bond a law? Yes, it is a law binding upon himself. Farther it ought not to bind. But shall a private contract be viewed in the venerable light of a law? Why not, if it has all its essential properties? Suppose this contract to have been made by millions, contracting on each side: it would have been dignified by the name of a treaty: as such, had the United States been the contractors on one side, it would have become a law of the land: as such, it would have become an important part of the law of nations. Is the act of millions more binding upon those millions, than

[w] 5. Rep. 119.

the act of one is binding upon that one? Light will break in upon us by degrees.

By the law of England, a man can bind himself. The law of England speaks not a language contrary to that of the law of nature. By this law also, a man can bind himself. "If among men," says Barbeyrac,[x] "the immediate reason why one ought to be subject to the command of another is ordinarily this, that he has voluntarily consented to it"—and we have shown, that this is not only *ordinarily*, but *always* the reason—"then," continues he, "this consent, and all other engagements whatever are only obligatory through that maxim of natural law, which tells us, that every one ought to observe what he has engaged himself to." This maxim is, indeed, a part of the law of a superiour; but this maxim is founded upon the previous truth—that a man can engage himself: I need not surely prove, that an engagement must be made before it can be observed. "That we should be faithful to our engagements," says the very learned President Goguet,[y] "is one of those maxims, which derive their origin from those sentiments of equity and justice, which God has engraven on the hearts of all men: they are taught us by that internal light, which enables us to distinguish between right and wrong." The same important lesson is delivered to nations, as well as to men.[z]

We see now, that, both by the law of England, and by the superiour law of nature, men and nations can bind themselves. Can they be bound without their consent?

[x] Puff. 67. n. 2. to b. 1. c. 6. s. 12.

[y] 1. Gog. Or. Laws. 7. 8.

[z] Vat. Pref. 12.

Is it necessary to dig for another foundation, on which the obligatory force of human laws can be laid? Can any other solid foundation be found?

That this foundation is sufficient to support the whole beautiful structure of human law, will abundantly appear.

"The union of families," says the same respectable author, whom I quoted just now, "could not have taken place but by an agreement of wills. When we view society as the effect of unanimous concord, it necessarily supposes certain covenants. These covenants imply conditions. These conditions are to be considered as the first laws."[a] We have already seen the sentiments of the excellent Hooker—that "human edicts, derived from any other human source, than the consent of those, upon whom they are imposed, are nothing better than mere tyranny. Laws they are not, because they have not the publick approbation."[b] "The mother of civil law," says Grotius,[c] "is that very obligation, which arises from consent." "So that the civil law," says his commentator, Barbeyrac,[d] "is, at the bottom, no more than a consequence of that inviolable law of nature—every man is obliged to a religious observance of his promise." "The legislative power of a civil society," says Dr. Rutherforth, in his Institutes of Natural Law,[e] "is acquired by the immediate and direct consent of the several individuals, who make themselves members of such society. And the legislative body acquires it, as by the immediate and direct consent of the collective body of the society, so by the remote and indirect consent of the several members."

[a] 1. Gog. Or. Laws. 7. [b] Hooker. b. 1. s. 10. p. 19. 20.

[c] Pref. 20. s. 16. [d] Id. note to s. 16. [e] Vol. 2. 222.

I hope I have now performed my engagement: I hope I have evinced, from authority and from reason, from precedent and from principle, that *consent* is the sole obligatory principle of human government and human laws. To trace the varying but powerful energy of this animating principle through the formation and administration of every part of our beautiful system of government and law, will be a pleasing task in the course of these lectures. Can any task be more delightful than to pursue the circulation of liberty through every limb and member of the political body? This kind of anatomy has a peculiar advantage—it traces, without destroying, the principle of life.

Before I conclude, it will be proper to take a concise view of the consequences, necessarily resulting from the doctrine, that the legislative power must be "absolute, uncontrolled, irresistible, and supreme." 1. The power, which makes the laws, cannot be accountable for its conduct; it cannot be submitted either to human judgment, or to human punishment. For both these, says Puffendorff,[f] suppose a superiour; but a superiour to the supreme, in the same order of men, and the same notion of government, is a contradiction. 2. If to every human law, a superiour is necessary: and if the power, which makes a human law, must be supreme; the consequence unquestionably is, that that power cannot be bound by the laws, which it makes: for where shall we find a superiour to what is supreme? "When a civil power," says Puffendorff,[g] "is constituted supreme, it must, on this very score, be supposed exempt from human laws; or, to speak more properly, above them. Human laws are

[f] B. 7. c. 6. s. 2. p. 687. [g] B. 7. c. 6. s. 3. p. 688.

nothing else but the decrees of the supreme power, concerning matters to be observed, by the subjects, for the publick good of the state. That no such edicts can directly oblige the sovereign is manifest; because his very name and title supposeth, that no bond or engagement can be laid on him by any other mortal hand: and for a person to oblige himself, under the notion of a lawgiver, or of a superiour, is an impossibility." 3. If the legislative power be absolute, uncontrolled, and supreme; all opposition to its acts must be unlawful. This, indeed, is not so much a consequence, as a part of the doctrine. In the language of the Commentaries, this power is "irresistible,"[h] Many recollect the numerous and the extravagant inferences, which, at a former period, were drawn from the supposed absolute, irresistible, uncontrolled, and supreme power of the British parliament. They will fall under our notice, when we come to examine the principles, the rise, and the progress of the American constitutions and governments.

I have already mentioned, that though Sir William Blackstone was the first, he has not been the last, who defined municipal law, as applied to the law of England, upon unsound and dangerous principles. This doctrine has been adopted by his successour in the Vinerian chair, though with some degree of apparent hesitation. "Every state," says he, "must, like individuals, be subject to certain rules." "The necessity of rules infers the necessity of political superiours."[i] "The giving of laws to a people, forms the most exalted degree of human sovereignty; and is, perhaps, in effect, or in strict propriety of speech, the only truly supreme power of the

[h] 1. Bl. Com. 49. [i] El. Jur. (4to) 26. 27.

state."[j] The sensible and decided Mr. Paley, in his principles of moral and political philosophy, has propagated the same doctrine without limitation and without reserve. "As a series of appeals" says he, "must be finite, there necessarily exists, in every government, a power, from which the constitution has provided no appeal; and which power, for that reason, may be termed absolute, omnipotent, uncontrollable, arbitrary, despotick; and is alike so, in all countries. The person, or assembly, in whom this power resides, is called the sovereign or the supreme power of the state. Since to the same power universally appertains the office of establishing publick laws, it is also called the legislature of the state."[k] It is not improbable, that the doctrine is disseminated wherever the Commentaries are generally received as authority.

I have already intimated, that there is a period in our lives, when we receive implicitly whatever we are taught, especially by those, in whom, we think, we can confide. "It is the intention of nature," says the ingenious Dr. Reid,[l] "that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our belief should be guided by the authority and reason of others, before it can be guided by our own reason," At this very period of life, the Commentaries, as a book of authority, are put into the hands of young gentlemen, to form the basis of their law education. Is it surprising, that the reception of its doctrines should be indiscriminate, as well as implicit? indeed the former is the unavoidable consequence of the latter. But doctrines received implicitly,

[j] El. Jur. (4to) 43. [k] 2. Paley 185. [l] Inq. 433.

at this period of life, are not so easily dismissed in its subsequent stages. "For," says the same experienced judge of human nature,[m] "the novelty of an opinion, to those who are too fond of novelties; the gravity and solemnity, with which it is introduced; the opinion we have entertained of the author; and, above all, its being fixed in our minds at that time of life, when we receive implicitly what we are taught; may cover its absurdity, and fascinate the understanding for a time"—I will add—for a long time. These observations explain, and, while they explain, they justify my conduct in examining, so fully and so minutely, the definitions of law in general and of municipal law given in the Commentaries on the laws of England. This full and minute examination has, at the same time, given me a fit opportunity of discovering, of illustrating, and, I hope, of establishing very different principles, as the foundation of the science of law. In this, as in every other science, it is all important, that the foundation be properly and surely laid.

Permit me to close this subject with the sentiments, which a very learned and ingenious judge expressed, on an occasion somewhat similar to this, and in a situation somewhat similar to mine. The principles of the revolution in England have been dear to whigs: they have been opposed inveterately and pertinaciously by tories. Some passages in the law performances of the great and good Lord Chief Justice Hale were conceived, on both sides, and justly, to militate against the principles of that revolution. These passages were cited with uncommon exultation, and were, no doubt, disseminated by the votaries of the abdicated family with

[m] Reid. Ess. In. 568.

extraordinary zeal. Seventy years after the revolution, and sixteen years after the last rebellion, which was raised in order to overturn its happy establishment, Mr. Justice Foster thought it his duty to publish some observations on those passages, with a view to detect and expose their mistakes, which were great, and to defend the principles, on which the revolution and the subsequent establishment were founded. Concerning these observations, and their publication, he thus speaks, "The cause of the Pretender seems now to be absolutely given up. I hope in God it is so. But whether the root of bitterness, the principles which gave birth, and growth, and strength to it, and have been, twice within our memory, made a pretence for rebellion, at seasons very critical, whether those principles be totally eradicated, I know not. These I encounter, by showing that certain historical facts, which the learned Judge hath appealed to in support of them, either have no foundation in truth, or, were they true, do not warrant the conclusions drawn from them.

"The passages I animadvert upon have been cited with an uncommon degree of triumph by those, who, to say no worse of them, from the dictates of a misguided conscience, have treated the revolution and present establishment as founded in usurpation and rebellion; and they are in every student's hand. Why, therefore, may not a good subject, be it in season or out of season, caution the younger part of the profession against the prejudices, which the name of Lord Chief Justice Hale, a name ever honoured and esteemed, may otherwise beget in them? I, for my part, make no apology for the freedom I have taken with the sentiments of an author,

whose memory I can love and honour, without adopting any of his mistakes on the subject of government.

"It cannot be denied, and I see no reason for making a secret of it, that the learned Judge hath, in his writings, paid no regard to the principles, upon which the revolution and present happy establishment are founded. The prevailing opinion of the times, in which he received his first impressions, might mislead him. And it is not to be wondered at, if the detestable use the parliamentary army made of its success in the civil war did contribute to fix him in the prejudices of his early days. For, in the competition of parties, extremes, on one side, almost universally produce their contraries on the other. And even honest minds are not always secured against the contagion of party prejudice.

"But, it matters not with us, whether his opinion was the effect of prejudices early entertained, or the result of cool reflection; since the opinion of no man, how great or good soever, is or ought to be the sole standard of truth."[n]

The next great title in my course of lectures is MAN, the subject of all, and the author, as well as the subject of part of those kinds of law, of which I have now given a general and summary view. Man I shall consider as an individual, as a member of society, as a member of a confederation, and as a part of the great commonwealth of nations.

On a slight glance of this subject, it may seem, perhaps, not to be very intimately connected with a system

[n] Fost. Pref. 6, 7.

of lectures on law. And, indeed, it must be owned, that as law, or what is called law, is sometimes taught, and sometimes practised, there is but a slender and very remote alliance between law and man. But, in the real nature of things, the case is very different.

You have not, I am sure, forgotten, that, in an early address, which I made to you, I recommended, most earnestly, to the utmost degree of your attention, an outline of study, supported with all the countenance and authority of three distinguished and experienced characters—Bacon, Bolingbroke, Kaims: it will not, I am sure, be forgotten, that metaphysical knowledge, or the philosophy of the human mind, formed a very conspicuous part of that outline; one of those "vantage grounds," which every one must climb, who aims to be really a master in the science of law.

"Natura juris a natura hominis repetenda est," is the judgment of Cicero. It is a judgment, not more respectable on account of the high authority, which pronounces it, than on account of its intrinsick solidity and importance.

You have heard me mention, that a proper system of evidence is the greatest *desideratum* in the law. From a distinct and accurate knowledge of the human mind, and of its powers and operations, the principles and materials of such a system must be drawn and collected.

Whatever produces belief may be comprehended under the name of evidence. Belief is a simple and undefinable operation of the mind; but, by the constitution of our nature, it is intimately and inseparably associated

with many other powers and operations. This association should be minutely traced: all its properties and consequences should be distinctly marked. Belief attends on the perceptions of our external senses, on the operations of our internal consciousness, on those of memory, on those of intuition, on those of reason: it is attendant, likewise, on the veracity, the fidelity, and the judgment of others. Hence the evidence of sense, the evidence of recollection, the evidence of consciousness, the evidence of intuition, the evidence of demonstration, probable evidence, the evidence of testimony, the evidence of engagements, the evidence of opinion, and many other kinds of evidence; for this is, by no means, a complete enumeration of them.

It is difficult, perhaps it is impossible, to discover any common principle, to which all these different kinds of evidence can be reduced. They seem to agree only in this, that, by the constitution of our nature, they are fitted to produce belief.

It is superfluous to add, that the social operations of the mind should be well known and studied by him, who wishes to reach the genuine principles of legal knowledge.

CHAPTER VI.

OF MAN, AS AN INDIVIDUAL.

"KNOW thou thyself," is an inscription peculiarly proper for the porch of the temple of science. The knowledge of human nature is of all human knowledge the most curious and the most important. To it all the other sciences have a relation; and though from it they may seem to diverge and ramify very widely, yet by one passage or another they still return.

In every art and in every disquisition, the powers of the mind are the instruments, which we employ; the more fully we understand their nature and their use, the more skilfully and the more successfully we shall apply them. In the sublimest arts, the mind is not only the instrument, but the subject also of our operations and inquiries. The poet, the orator, the philosopher work upon man in different ways and for different purposes. The statesman and the judge, in pursuit of the noblest ends, have the same dignified object before them. An accurate and distinct knowledge of his nature and powers, will undoubtedly diffuse much light and splendour over

the science of law. In truth, law can never attain either the extent or the elevation of science, unless it be raised upon the science of man.

The knowledge of human nature is not more distinguished by its importance, than it is by its difficulty. Though the mind—the noblest work of God, which reason discovers—is of all objects the nearest to us, and seems the most within our view; yet it is no easy matter to attend to its operations and faculties, in such a manner as to obtain clear, full, and distinct conceptions concerning them. The consequence has been, that in no branch of knowledge have greater errours, and even absurdities, insinuated themselves, than in the philosophy of the human mind. Instead of proceeding slowly and cautiously by observation and experience, those who have written on this subject have adopted the more easy, but the less certain mode of process by hypothesis and analogy. The event has been such as might have been expected: those who have cultivated other sciences, have made progress, because they have set out in the right road, and have consulted the proper guides: those who have speculated on human nature have, too many of them, been involved in a dark and inextricable labyrinth, because they commenced their journey in an improper direction, and have listened to the information of those, whose information was the result of conjecture and not of experience. But this darkness will not last for ever. Some future sun of science will arise, and illuminate this benighted part of the intellectual globe. When the powers of the human mind shall be delineated truly and according to nature, those, whose vision is not distorted by prejudice, will recognise their own features in the picture. They will be surprised that things,

in themselves so clear, could be so long involved in absurdity; and, when the truth is to be found in their own breasts, that they have been led so far from it by false systems and theories.

The only instrument, by which we can have any distinct notion of the faculties of our own and of others minds, is reflection. By this power, the mind makes its own operations the object of its attention, and views and examines them on every side. This power of reflection or self-examination, so absolutely indispensable in the investigation of what is so near and so important to us, is neither soon nor easily acquired or exerted. The mind, like the eye, contemplates, with facility, every object around it; but is with difficulty turned inward upon its own operations. Whoever has attempted to experiment on the philosophy of the mind—the only legitimate way in which a knowledge of it can be acquired—must have found how utterly impossible it is to make any clear and distinct observations on our faculties of thought, unless the passions, as well as the imagination, be silent and still. The materials on which we reflect are so minute, so mixed, and so volatile, that the strongest minds alone can, in any degree, arrange them, even in their quietest state. The least breath of passion moves and agitates them, so as to render every thing distorted and deformed.

Reflection, like all our other powers, is greatly improved by exercise: it thus becomes habitual; the difficulty attending it daily diminishes; and the advantages resulting from it are many and great. One who is accustomed habitually to reflection, can think and speak with accuracy on every subject; and can judge and

discriminate for himself in many cases, in which others must trust to notions borrowed, confused, and indistinct.

Assisting and subservient to accurate reflection, is the structure of language, which is of much use in developing the operations of the mind. The language of mankind is expressive of their thoughts. The various operations of the understanding, will, and passions have various forms of speech corresponding to them, in all languages; a due attention to the signs, throws light on the things signified by them. There are, in all languages, modes of speech, by which men signify their judgment, or give their testimony, or accept, or refuse, or command, or threaten, or supplicate, or ask information or advice, or plight their faith in promises or contracts. If such operations were not common to mankind, we should not find, in all languages, forms of speech by which they are expressed.

A system of human nature is not expected from this chair. The undertaking, indeed, is too vast for me; it is too vast for any one man, however great his genius or abilities may be. But it comes directly within our plan, to consider it so far as to have just conceptions of man in two most important characters, as an author, and as a subject of law; as accountable for his own conduct, as capable of directing the conduct both of himself and of others. The laws, which God has given to us, are strictly agreeable to our nature; they are adjusted with infallible correctness to our perfection and happiness. On those, which we make for ourselves, the same characters, as deeply and as permanently as possible, ought to be impressed. But how, unless we study and know our

nature, shall we make laws fit for it, and calculated to improve it?

I mean not—for it would be uninstructive—to give you an account of the divisions and subdivisions, into which metaphysicians have attempted to class and arrange our mental powers and principles. No division has been more common, and, perhaps, less exceptionable, than that of the powers of the mind into those of the understanding and those of the will. And yet even this division, I am afraid, has led into a mistake. The mistake I believe to be this; it has been supposed, that in the operations ascribed to the will, there was no employment of the understanding; and that in those ascribed to the understanding, there was no exertion of the will. But this is not the case. It is probable, that there is no operation of the understanding, in which the mind is not in some degree active; in other words, in which the will has not some share. On the other hand, there can be no energy of the will, which is not accompanied with some act of the understanding. In the operations of the mind, both faculties generally, if not always, concur; and the distinction between them can be of no farther use, than to arrange each operation under that faculty, which has the largest share in it. Thus by the perceptive powers, we are supposed to acquire knowledge, and by the powers of volition, we are said to exert ourselves in action.

If even this division, long and generally received as it has been, has given occasion to a mistake; we have no great reason to indulge a partiality for others. The truth is, that they have been generally superficial and inaccurate; they have depended more on fancy than on nature; and have proceeded more from presumptuous

attempts to accommodate the mind to a system, than from respectful endeavours to accommodate a system to the mind. Abhorrent from the first, restrained by propriety from aiming at the second; let my humble task be to select and make such observations concerning our powers, our dispositions, our principles, and our habits, as will illustrate the intimate connexion and reciprocal influence of religion, morality, and law.

Simplicity is the favourite object of system. In the material world, attachment to this simplicity misled the penetrating Des Cartes. Even the great Newton, patient, faithful, and attentive as he was in tracing Nature's footsteps, was, on one occasion, almost seduced, by the same attachment, to follow hypothesis, the ape of Nature. A body of morality, pretending to be complete, has sometimes been built on a single pillar of the inward frame: the entire conduct of life has been accounted for, at least the attempt has been made to account for it, from a single quality or power. Many systems of this kind have appeared, calculated merely to flatter the mind. According to some writers, man is entirely selfish; according to others, universal benevolence is the highest aim of his nature. One founds morality upon sympathy solely: another exclusively upon utility. But the variety of human nature is not so easily comprehended or reached. It is a complicated machine; and is unavoidably so, in order to answer the various and important purposes, for which it is formed and designed.

How wretched are oftentimes the representations and the imitations of Nature's works! A puppet may make a few motions and gesticulations; but how unlike it is to that, which it represents! How contemptible, when

compared to the body of a man, whose structure the more we know, the more we discover its wonders, and the more sensible we are of our ignorance! Is the mechanism of the mind so easily comprehended, when that of the body is so difficult? Yet, by some systems, which are offered to us, with pretensions the most lofty and magnificent, a few laws of association, joined to a few original feelings, explain the whole mechanism of sense, imagination, memory, belief, and of all the actions and passions of the mind. Is this the man that Nature made? It is a puppet surely, contrived to mimick her work. The more we know of other parts of nature, the more we approve and admire them. But when we look within, and consider the mind itself, which makes us capable of all our prospects and enjoyments; if it is indeed what some late systems of high pretensions make it, we find we have only been in an enchanted castle, imposed upon by spectres and apparitions. We blush to think how we have been deluded; we are ashamed of our frame; and can hardly forbear expostulating with our destiny. Is this thy pastime, O Nature, to put such tricks upon a silly creature, and then take off the mask, and show him how he has been befooled? If this is the philosophy of human nature; my soul! enter thou not into her secrets. It is surely the forbidden tree of knowledge: I no sooner taste of it, than I perceive myself naked.—Such, in substance, has been the well founded expostulation* against some of the late and famed theories concerning the human mind. The theory, which we adopt, because we think it grounded in truth and reality, will open very different—the most enrapturing prospects.

* Reid's Inq. 26. 28.

The mind itself, indeed, is *one* internal principle: but its operations many, various, connected, and complicated: its perceptions are mixed, compounded, and decompounded, by habits, associations, and abstractions: its powers both of action and perception, on account either of a diversity in their objects, or in their manner of operating, are considered as separate and distinct faculties. This I take to be a just state of things with regard to the mind, and its perceptions, operations, and powers. But I think it is highly probable, that, in opposition to this account, the mind has been too often considered as distributed into different divisions and departments: and that the operations, in each department, have been considered as simple and unmixed. Each one of you, by recalling to remembrance your manner of thinking upon these subjects, will be able to say whether this has not been the case.

Again; the mind is an *active* principle. It has been the opinion of some modern philosophers, that, in thinking and sensation, the mind is merely passive. In all ages, and in all languages, the various modes of thinking have been expressed by words of active signification; such as seeing, hearing, reasoning, willing. It seems, therefore, to be the natural judgment of mankind, that the mind is active in its various ways of thinking; and for this reason, they are called its operations, and are expressed by active verbs. Sensation, imagination, memory, and judgment have, in all ages, been considered, by the vulgar, as *acts* of the mind. This is shown by the manner, in which they are expressed in all languages. When the mind is much employed in them, we say it is very active; whereas, if they were impressions only, as the *ideal* philosophy would lead us to con-

ceive, we ought, in such a case, rather to say, that the mind is very passive. The paper which I hold in my hand was not active, when it received the characters written on it.

Man is composed of a body and a soul intimately connected; but at what time and in what manner connected, we do not know. In consequence of this connexion, the body lives and performs the functions necessary to life for a certain time; increases for a certain time in stature and in strength; is nourished with food, and is refreshed by sleep. In consequence of the same connexion, the body moves; the hands fulfil their various and active offices; the tongue expressive speaks; and the eyes sometimes still more expressive look. The body, and the things of the body, are far from being beneath our regard. In its present state, it is a mansion well fitted for the temporary residence of its noble inhabitant: in its renewed state, it will be endowed with the power of retaining that fitness for ever.

The fabrick of the human mind, however, is more astonishing still. The faculties of this are, with no less wisdom, adapted to their several ends, than the organs of the other. Nay, as the mind is of an order higher than that of the body, even more of the wisdom and skill of the divine Architect is displayed in its structure. In all respects, fearfully and wonderfully are we made.

From experience we find, that when external things are within the sphere of our perceptive powers, they affect our organs of sensation, and are perceived by the mind. That they are perceived we are conscious; but the manner in which they are perceived, we cannot ex-

plain; for we cannot trace the connexion between our minds and the impressions made on our organs of sense; because we cannot trace the connexion which subsists between the soul and the body. Frequent and laborious have been the attempts of philosophers to investigate the manner, in which things external are perceived by the mind. Let us imitate them, neither in their fruitless searches to discover what cannot be known; nor in framing hypotheses which will not bear the test of reason, or of intuition; nor in rejecting selfevident truths, which, though they cannot be proved by reasoning, are known by a species of evidence superiour to any that reasoning can produce.

Many philosophers allege that our mind does not perceive external objects themselves; that it perceives only *ideas* of them; and that those ideas are actually in the mind. When it has been intimated to them, that, if this be the case; if we perceive not external objects themselves, but only ideas; the necessary consequence must be, that we cannot be certain that any thing, except those ideas, exists; the consequence has been admitted in its fullest force. Nay, it has been made the foundation of another theory, in which it has been asserted, that men and other animals, the sun, moon, and stars, every thing which we think we see, and hear, and feel around us, have no real existence; that what we dignify with such appellations, and what we suppose to be so permanent and substantial, are nothing more than "the baseless fabrick of a vision"—are nothing more than ideas perceived in the mind. The theory has been carried to a degree still more extravagant than this; and the existence of mind has been denied, as well as the existence of body. We shall have occasion to examine these cas-

tles, which have not even air to support them. Suffice it, at present, to observe, that the existence of the objects of our external senses, in the way and manner in which we perceive that existence, is a branch of intuitive knowledge, and a matter of absolute certainty; that the constitution of our nature determines us to believe in our senses; and that a contrary determination would finally lead to the total subversion of all human knowledge. For this belief we cannot, we pretend not to assign an argument; it is a simple and original, and therefore an inexplicable act of the mind. It can neither be described nor defined. But one thing we shall engage to do, though, at present, we are not prepared for it. When those philosophers prove by argument, that we ought to receive the testimony of reason; we then will prove, by argument, that we ought to receive the testimony of sense. Till that time, let us receive the testimony of both, as of faculties, with which we have been endowed, for wise and benevolent purposes, by him who is all-true. The senses were intended by him to give us all that information of external objects, which he saw to be proper for us in our present state. This information they convey without reasoning, without art, without investigation on our part. They are five in number. Tastes are referred to the sense of tasting: odours, to that of smelling: sounds, to that of hearing: light and colours, to that of seeing: all other bodily sensations, to that of touch.

Our external senses are not indeed the most exalted of our powers; but they are powers of real use and importance; and, to powers of a more dignified nature, they are most serviceable and necessary instruments. It has been the endeavour of some philosophers to degrade them below that rank, in which they ought to be

placed. They have been represented as powers, by which we receive sensations only of external objects. Even this part of their service is far from being unimportant. The perception of external objects is a principal link of that mysterious chain, which connects the material with the intellectual world. But this, as I before mentioned,[b] is not the whole of the functions discharged by the senses: they judge, as well as inform: they are not confined to the task of conveying impressions; they are exalted to the office of deciding concerning the nature and the evidence of the impressions, which they convey.

The senses are the vehicles of pleasures, less elevated indeed than those which are intellectual, still less elevated than those which are moral, but pleasures not beneath the regard of a rational and a moral mind. The pleasures of sense, it is true, ought, like every thing else that is subordinate, to be prevented from transgressing their natural and proper bounds: but that is no reason why they should be either neglected or despised. To be without the senses even of tasting and smelling, would be a real misfortune, because it would be a real inconvenience, and would be attended with the loss of sensations innocent and agreeable. The organ of smelling is often the speediest and the surest instrument to prevent or to recover a person from a fainting fit. The senses are susceptible of improvement; and they ought to be improved; for they are the sources both of pleasures and of advantage. Some of the senses are the sources of pleasures of a very elegant kind. The ear is the welcome messenger of melody and harmony, as well as

[b] Ante. p. 136.

of sound: the eye, of beauty, as well as of light and colours: and the man who feels not agreeable emotions from the contemplation of beauty, and is not moved with concord of sweet sounds—I will not finish the fine poetical description—I will only say, that he has no reason to exult in the absence of those enjoyments. Both the eye and the ear are capable of being refined to a very great height. For this I need only appeal to judges of musick, of painting, of statuary, of architecture. In many mechanick arts, a good eye, as it is called, is of excellent service. Gentlemen of the military profession—a profession which has something singular in it; a profession which should be learned, that it may never be used—know the importance of a military eye.

It is not without design that I have said thus much concerning the utility and importance of our senses. It has been the custom of certain philosophers, and, I must here add, of certain divines, to represent human nature as in a state of hostility endless and uninterrupted, internal as well as external. According to these philosophers, and according to these divines, he is at war with all the world, as well as with himself. The senses have been considered as incorrigible rebels, who aspired to be tyrants: the inference has been, that they ought to be treated as the vilest slaves. The monk, who built a dead wall before his window, that he might not be seduced by the beauties of creation, introduced no new doctrine; he only carried to an unusual height a doctrine already received. This doctrine embraces the two vicious extremes, and excludes the golden mean. Whence this sombre system derives its origin, I care and inquire not. Of one thing I am certain; it is not that wisdom which cometh from above: for the ways of that wisdom are the

ways of pleasantness, and all her paths are peace. Our senses ought to be deemed, as they really are, and as they are intended to be, the useful and pleasing ministers of our higher powers. Let it be remembered, however, that, of the pleasures of sense, temperance and prudence are the necessary and inseparable guides and guardians; detached from whom, those pleasures lose themselves in another nature and in other names: they become vices and pains.

As the external senses convey to us information of what passes without us; we have an internal sense, which gives us information of what passes within us. To this we appropriate the name of consciousness. It is an immediate conception of the operations of our own minds, joined with the belief of the existence of those operations. In exerting consciousness, the mind, so far as we know, makes no use of any bodily organ. This operation seems to be purely intellectual. Consciousness takes knowledge of every thing that passes within the mind. What we perceive, what we remember, what we imagine, what we reason, what we judge, what we believe, what we approve, what we hope, all our other operations, while they are present, are objects of this.

This, like many other operations of the mind, is simple, peculiar, inaccessible equally to definition and analysis. For its existence every one must make his appeal to himself. Are you conscious that you remember, or that you think? We have already seen, that the existence of the objects of sense is one great branch of intuitive knowledge: of the same kind of knowledge, the existence of the objects of consciousness is another branch, more extensive and important still. When a man

feels pain, he is certain of the existence of pain; when he is conscious that he thinks, he is certain of the existence of thought. If I am asked to prove that consciousness is a faithful and not a fallacious sense; all the answer which I can give is—I feel, but I cannot prove; I can find no previous truth more certain or more luminous, from which this can derive either evidence or illustration. But some such antecedent truth is necessarily the first link in a chain of proof. For proof is nothing else than the deduction of truths less known or less believed, from others that are more known or better believed. "What can we reason, but from what we know?" [c] The immediate and irresistible conviction, which I have of the real existence of those things, of whose existence I am conscious, is a conviction produced by intuition, not by reason. He who doubted, or pretended to doubt, concerning every other information, deemed himself justified in taking for granted the veracity of that information, which was given to him by his consciousness. He was conscious that he thought; and therefore he was satisfied that he really thought.—"Cogito" was a first principle, which he who pronounced it dangerous and unphilosophical to assume any thing else, judged it safe and wise to assume. And when he had once assumed that he thought, he gravely set to work to prove, that because he thought he existed. His existence was true, but he could not prove it; and all his attempts to prove it have been shown, by a succeeding philosopher, to be inconsistent with the rules of sound and accurate logick. But even this succeeding philosopher, who showed that Des Cartes had not proved his existence, and who, from the principles of his own phi-

[c] Pope's Ess. on Man. Ep. 1. v. 18.

losophy could not assume this existence without proof—even this philosopher has assumed the truth of the information given by consciousness. "Mr. Hume, after annihilating body and mind, time and space, action and causation, and even his own mind, acknowledges the reality of the thoughts, sensations, and passions, of which he is conscious."[d] He has left them—how philosophically I will not pretend to say—to "stand upon their own bottom, stript of a subject, rather than call in question the reality of their existence."[e] Let us felicitate ourselves, that there is, at least, one principle of common sense, which has never been called in question. It is a first principle, which we are required and determined, by the very constitution of our nature and faculties, to believe. Perhaps we shall find other first principles, which, by the same constitution of our nature and faculties, we are equally required and determined to believe. Such principles are parts of our constitution, no less than the power of thinking: reason can neither make nor destroy them: like a telescope, it may assist, it may extend, but it cannot supply natural vision.

Possessed of the senses and of consciousness; and believing, as we must believe, the truth of the information, which they give, we cannot complain that our knowledge is a *baseless* fabrick; but if we were possessed only of those powers, we might well complain, that our knowledge was a *fleeting* fabrick. The moment that an external object is removed from the operation of our senses, that moment our perception of it is lost: the moment our attention is withdrawn from the consideration of any of the powers of the mind, that moment our

[d] Reid's Ess. Int. 579. [e] Reid's Inq. 39. 139.

immediate conception of it is gone. The external object may, indeed, return; but it will return as a stranger: the internal power may become again the object of our consciousness; but it will appear as an object hitherto unknown. As to the purpose of accumulating knowledge, every succeeding moment would be as the first moment of our existence. We should perceive what is present; but we should have no power of connecting what is present, with what is past. Without this connecting power, we should have no means of forming any conjecture concerning what is to come. But the divine hand that made us, leaves not its workmanship unfinished. We are endowed with a power, by which we have an immediate knowledge of things past. We are provided with a storehouse, fitted to preserve things new and old. And of this storehouse it is the extraordinary property, that the more it is filled with treasure, the more capacious and retentive it becomes. You know I speak of the memory. Much might be usefully said concerning this necessary and important power; but my plan, which comprehends such a variety of parts, forbids me to enlarge upon each of them.

Of the immediate cause of remembrance we know nothing: and all attempts to trace and discover that cause have, to say the least of them, proved vain and illusory: it is one of those things, of which we must be contented to remain ignorant. But while of some things we ought to acquiesce in our ignorance; of others, we should be satisfied with our knowledge: though we cannot assign a cause *why* we remember, we know the fact that we *do* remember; and we know likewise another fact, that our remembrance is true. What we distinctly remember, we believe as strongly as what we

distinctly perceive. To give a reason why we believe the information of our perceptions, I have already declared myself incapable: the same declaration I now make, concerning the information of our memory. By the constitution of our nature, it is always accompanied with belief.

I had occasion to rescue the senses from the unjust disparagement, which they have sometimes suffered: let me now perform the same just office to the memory. You know it to be the fashion of some to exclaim, with a degree of affectation, how wretched their memories are. The design is not declared; but it is obvious. At the expense of their memory, they insinuate a compliment to their judgment: for it has somehow been received as an opinion, that a strong memory and a strong judgment have seldom been united in the same mind. Perhaps the beautiful lines of Mr. Pope may have contributed to give a currency to this sentiment: but the sentiment is ill founded. I will, indeed, admit, on one hand, that a great memory is often found without a great genius: but I will not admit, on the other, that a great genius is often found without a great memory. The contrary I believe to be generally, I will not say always, the case. Men of the most extensive abilities have been men also of the most extensive memories: witness Themistocles, Cicero, Cæsar, Bolingbroke. If these remarks be true, the compliment to judgment at the cost of memory is but a left-handed one. Instead of being rivals, judgment and memory are mutual assistants. Memory furnishes the materials which judgment selects, adjusts, and arranges. Those materials selected, adjusted, and arranged are more at the call of memory than before: for it is a well known fact, that those things, which are

disposed most methodically and connected most naturally, are the most distinct, as well as the most lasting objects of remembrance: hence, in discourse, the utility as well as beauty of order. Strength, as well as clearness in our perceptions greatly aids the memory: hence, in discourse, the utility as well as beauty of vivacity. Agreeable emotions, attending our perceptions, contribute to render them both clear and strong: hence, in discourse, the utility as well as beauty of every chaste and elegant ornament. That which is conveyed through the channel of two senses makes a stronger and more lasting impression, than that which is conveyed through the channel of one: hence, in discourse, the utility as well as beauty of just and expressive action. To associate the pleasing with the useful, is Nature's example as well as precept.

I have already intimated that memory is greatly susceptible of improvement: it is so to a surprising degree. This improvement is acquired by vigorous but prudent exercise; and by habitual but lively attention. I assign limitations both to exercise and attention, because both are liable to run into excess. A memory overloaded will make but little useful progress either in literature or business. An attention overstrained is apt to degenerate into what is, with singular propriety, termed absence of thought. To counterfeit this absent kind of thoughtfulness, has been the affectation of those, who wish to be deemed deep thinkers, without the trouble of thinking. To feel it is frequently the lot of those, who think too much. But it is a failing, not an excellence: it is to be avoided, not to be courted. When it begins to steal upon a studious person, he should relieve his attention by changing its object.

In all the ways, in which the objects of our thoughts have hitherto presented themselves to us, they have been necessarily attended with the act or operation of belief. But they may be presented to us in another way, unaccompanied with that act or operation. Let me exemplify this by a set of very familiar instances: for things may be exemplified, that cannot be defined. You see this handkerchief. You are necessarily determined to believe that you see it. You remember that, but a moment ago, I showed you a handkerchief. You are now necessarily determined to believe that you saw it. In the first instance, the handkerchief was seen: that was necessarily accompanied with the belief of its then present existence. In the second instance, the handkerchief was remembered: that was necessarily accompanied with the belief of its past existence. You may hereafter think of a handkerchief, certainly without seeing, probably without recollecting, the handkerchief, which I just now showed you. In the first instance, the perception was accompanied with the belief of present existence: in the second instance, the remembrance was accompanied with the belief of past existence: in the third and last instance, the conception is not accompanied with any belief at all. Conception is an operation of the mind, by which we apprehend a thing, without any belief or judgment concerning it, without referring it to present or past existence. Every one is conscious that he can conceive a thousand things, of whose present or past existence he has not the least belief. You have seen a mountain: you have seen gold: you can conceive a golden mountain: but can you believe its existence?

Conception enters into every operation of the mind. Our senses and our consciousness cannot convey to us

information concerning any object, without, at the same time, giving some conception of that object. If we remember any thing, we must have some conception of that, which we remember. In conception there is neither truth nor falsehood; for conception neither affirms nor denies. But though all the other operations of the mind include conception; conception itself may exist, detached from all the others, excepting consciousness. By logicians, conception is frequently called *simple apprehension.*

The powers of sensation, of consciousness, and of memory are exerted upon objects which exist, or have existed. Conception is often exerted upon objects, which have neither past, nor present, nor even future existence. The creative powers of conception and description possessed by Shakespeare were, by no means, confined to actual existence, past, present, or to come.

Judgment is an important operation of the mind; and is employed upon the materials of perception and knowledge. It is generally described to be, that act of the mind, by which one thing is affirmed or denied of another. But this description is, in one respect, too limited; in another, it is too extensive. It is too limited in this respect, that though our judgments, when expressed, are indeed expressed by affirmation or denial, yet it is not necessary to a judgment that it be expressed at all. Men may judge without affirming or denying any thing; nay, they may judge contrary to what they affirm or deny. The description is too extensive in this respect, that it includes testimony as well as judgment. When a judge pronounces his decree, he delivers it in the affirmative or negative: when a witness delivers his

testimony, he uses the affirmative or negative likewise. Judgment and testimony are, however, operations very different from one another: wrong judgment is only an errour: false testimony is something more.

In persons arrived at the years of discretion, their perceptions, their consciousness, their memory are objects of their judgment. Evidence is the ground of judgment; and where evidence is, it is impossible not to judge.

To every determination of the mind concerning what is true or what is false, the name of judgment may be assigned. Some consider knowledge[f] as a separate faculty, conversant about truth and falsehood: perhaps it is more accurate to consider it as a species of judgment; for without judgment, how can there be any knowledge? Judgments are intuitive, as well as discursive, founded on truths that are selfevident, as well as on those that are deduced from demonstration, or from reasoning of a less certain kind. The former, or intuitive judgments, may, in the strictest sense, be called the judgments of nature.

Sense and judgment are sometimes used, especially by some modern philosophers, in contradistinction to each other—very improperly. In common language, and in the writings of the best authors, sense always implies judgment: a man of sense is a man of judgment: common sense is that degree of judgment, which is to be expected in men of common education and common understanding.

[f] Locke on Hum. Und. b. 4. c. 14.

With the power of judging, the power of reasoning is very nearly connected. Both powers are frequently included under the general appellation of reason. But reasoning is strictly the process, by which we pass from one judgment to another, which is the consequence of it. In all reasoning, there must be one proposition, which is inferred, and another, at least, from which the inference is made.

Reason as well as judgment, has truth and falsehood for its objects: both proceed from evidence; both are accompanied with belief.

The power of reasoning is frequently selected as the characteristick quality, which distinguishes the human race from the inferiour part of the creation. From nature the capacity of reasoning is unquestionably derived; but it may be wonderfully strengthened, improved, and extended by art. Imitation and exercise are the two great instruments of improvement.

In a chain of reasoning, the evidence must proceed regularly and without interruption from link to link: the evidence of the last conclusion can be no greater than that of the weakest link in the chain; because if even the weakest link fails, the whole chain is broken.

In reasoning, the most useful and the most splendid talent is the invention of intermediate proofs. In all productions of the understanding, invention is entitled to the highest praise. It implies a luminous view of the object proposed, and sagacity and quickness in discerning, selecting, and employing, to the utmost advantage, the means that are best fitted for accomplishing that

object. In the assemblage of those qualities consists that superiority of understanding, which is denominated genius.

Reasoning is distinguished into two kinds; that, which is demonstrative; and that, which is only probable. In demonstrative reasoning there are no degrees; the inference, in every step of the series, is necessary; and it is impossible but that, from the premises, the conclusion must flow. Hence demonstrative reasoning can be applied only to such truths as are necessary; not to such as are contingent.

With regard to reasoning, which is only probable, the connexion between the premises and the conclusion is not a necessary connexion. Probability is susceptible of numerous and widely differing degrees of strength and weakness. The degrees of evidence are measured by their effect upon a clear, a sound, and an unprejudiced understanding. Every degree of evidence produces a proportioned degree of knowledge and belief.

Probable evidence may be distributed into a number of different kinds. One, and a very important one, is that of human testimony. On this a great part of human knowledge depends. History and law resort to it for the materials of decision and faith. To examine, to compare, and to appreciate this kind of evidence is the business of the judge, the juryman, the counsel, and the party. Without some competent discernment concerning it, no man can act with common prudence or safety in the ordinary occurrences of life.

Another kind of probable evidence is, the opinion of those, who are professional judges of the point in question.

In England, a reference is sometimes made to the judges for their opinions in a matter of law. On a trial, recourse is frequently had to the professional sentiments of a physician. A shoemaker could point out to Apelles himself a defect in the picture of a shoe. A tyrant, nurtured and practised in the tyrant's art, could, at the first glance, discover a mistake in the representation of a decollated head.

A third kind of probable evidence is that, by which we recognise the identity of the same thing, and the diversity of different things. This kind of evidence is of the greatest consequence in the affairs of life. By it, the identity of persons and things is determined in courts of justice. In acquiring, retaining, and applying this kind of evidence, there is a wonderful diversity of talents in different men. Some will recollect and distinguish almost all the faces they have ever seen: others are much more slow, and much less retentive in this species of recollection and discrimination.

There are many other kinds of probable evidence, that well deserve the study of the lawyer, the philosopher, and the man. But this is not the proper occasion to attempt an enumeration of them.

Every free action has two causes, which cooperate in its production. One is moral; the other is physical: the former is the will, which determines the action; the latter is the power, which carries it into execution. A paralytick may will to run: a person able to run, may be unwilling: from the want of will in one, and the want of power in the other, each remains in his place.

Our actions and the determinations of our will are generally accompanied with liberty. The name of liberty we give to that power of the mind, by which it modifies, regulates, suspends, continues, or alters its deliberations and actions. By this faculty, we have some degree of command over ourselves: by this faculty we become capable of conforming to a rule: possessed of this faculty, we are accountable for our conduct.

But the existence of this faculty has been boldly called in question. It has been asserted, that we have no sense of moral liberty; and that, if we have such a sense, it is fallacious.

With regard to the first question, let every one ask it of himself. Have I a sense of moral liberty? Have I a conviction that I am free? If you have; this sense—this conviction is a matter of fact, or an object of intuition; and vain it is to reason against its truth or existence.

If it exists; why is it to be deemed fallacious? Are there peculiar marks of deception discoverable in it? Can any reason be assigned why we should suspect it, and not every other sense or power of our nature? He that made one, made all. If we are to suspect all; we ought to believe nothing.

But by what one especial power are we told that we ought to suspect all others? On which is this exclusive character of veracity impressed? If Nature is fallacious; how do we learn to detect the cheat? If she is a juggler by trade; is it for us to attempt to penetrate the mysteries of her art, and take upon us to decide when it is that she presents a true, and when it is that she presents a false

appearance? If she is false in every other instance, how can we believe her, when she says she is a liar?

But she does not say so. She is, and she claims to be honest; and the law of our constitution determines us to believe her. When we feel, or when we perceive by intuition, that we are free; we may assume the doctrine of moral liberty, as a first and selfevident, though an undemonstrable principle.

I have frequently mentioned *first principles*. The evidence, on which they ought to be received, well deserves discussion and attention. This is a subject which has been greatly misunderstood, and, perhaps, misrepresented. It is a subject, in which inferences, destructive of all knowledge and virtue, have been drawn, with all the pomp and parade of metaphysical sagacity. It is a subject, concerning which proper conceptions are essentially necessary to the progress of all science, that is truly valuable. They are peculiarly necessary in the study of law, in which evidence bears such an active and distinguished part. To believe our senses—to give credit to human testimony, has been considered as unphilosophical, and, consequently, irrational, if not absurd. The connexion, on this subject, between the principles of law, of philosophy, and of human nature has never, so far as I know, been sufficiently traced or explained.

Of some philosophers of no small fame, and of no small influence in propagating a certain fashionable—creed, I was going to say; but that would be peculiarly improper—system I will call it, by a particular indulgence—Of such philosophers it has been the favourite doctrine, that reason is the supreme arbitress of human

knowledge; that by her solely we ought to be governed; that in her solely we ought to place confidence; that she can establish first principles; that she can ascertain and correct the mistakes of common sense.

Reason is a noble faculty, and when kept within its proper sphere, and applied to its proper uses, exalts human creatures almost to the rank of superiour beings. But she has been much perverted, sometimes to vile, sometimes to insignificant purposes. By some, she has been chained like a slave or a malefactor; by others, she has been launched into depths unknown or forbidden.

Are the dictates of our reason more plain, than the dictates of our common sense? Is there allotted to the former a portion of infallibility, which has been denied to the latter? If reason may mistake; how shall the mistake be rectified? shall it be done by a second process of reasoning, as likely to be mistaken as the first? Are we thus involved, by the constitution of our nature, in a labyrinth, intricate and endless, in which there is no clue to guide, no ray to enlighten us? Is this true philosophy? is this the daughter of light? is this the parent of wisdom and knowledge? No. This is not she. This is a fallen kind, whose rays are merely sufficient to shed a "darkness visible" upon the human powers; and to disturb the security and ease enjoyed by those, who have not become apostates to the pride of science. Such degenerate philosophy let us abandon: let us renounce its instruction: let us embrace the philosophy which dwells with common sense.

This philosophy will teach us, that first principles are in themselves apparent; that to make nothing selfevident,

is to take away all possibility of knowing any thing; that without first principles, there can be neither reason nor reasoning; that discursive knowledge requires intuitive maxims as its basis; that if every truth would admit of proof, proof would extend to infinity; that, consequently, all sound reasoning must rest ultimately on the principles of common sense—principles supported by original and intuitive evidence.

In the investigation of this subject, we shall have the pleasure to find, that those philosophers, who have attempted to fan the flames of war between common sense and reason, have acted the part of incendiaries in the commonwealth of science; that the interests of both are the same; that, between them, there never can be ground for real opposition: that, as they are commonly joined together in speech and in writing, they are inseparable also, in their nature.

We assign to reason two offices, or two degrees. The first is, to judge of things selfevident. The second is, from selfevident principles, to draw conclusions, which are not selfevident. The first of these is the province, and the sole province, of common sense, and, therefore, in its whole extent, it coincides with reason; and is only another name for one branch or one degree of reason. Why then, it may be said, should it have a particular name assigned to it, since it is acknowledged to be only a degree of reason? To this it may be answered, why would you abolish a name, which has found a place in all civilized languages, and has acquired a right by prescription? But this degree of reason ought to be distinguished by a particular name, on two accounts. 1. In the greatest part of mankind, no other degree of reason

is to be found. It is this degree of reason, and this only, which makes a man capable of managing his own affairs, and answerable for his conduct towards others. 2. This degree of reason is purely the gift of heaven; and where heaven has not given it, no education can supply it; though, where it is given, it may, in a certain degree, be improved. But the second degree of reason is learned by practice and rules, where the first is wanting.

From the age of Plato down to the present century, it has been the opinion of philosophers, that nothing is perceived but what is in the mind which perceives it: that the mind takes no direct cognizance of external things; but that it perceives them through the medium of certain shadows or images of them: those images were called by the ancients *species*, *forms*, *phantasms*; by the moderns they are called *ideas*.

On this foundation the systems of Des Cartes and Locke have been built. The doctrines of Mr. Locke have been received, not only in England, but in many other parts of Europe, with unbounded applause; and to his theory of the human understanding the same kind of respect and deference has been paid, as to the discoveries of Sir Isaac Newton in the natural world.

The school of Mr. Locke has given rise to two sects: at the head of one are Berkely and Hume: at the head of the other are Hartley and Priestley.

In the extension of Mr. Locke's principles, the Bishop of Cloyne conceived that he saw reason to deny the reality of matter; and to resolve all existence into mind.

In his own sublime language, he thought he discovered, "that all the choir of heaven and furniture of the earth; all those bodies that compose the frame of the universe, are merely ideas, and exist only in the mind."

Mr. Hume, proceeding on the same principles of reasoning, advances boldly a step farther: he thinks he sees reason for denying the existence of mind as well as of matter; he annihilates spirit as well as body; and reduces mankind—I use his own words—to "a bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity, and are in a perpetual flux and movement." "There is properly no simplicity in the mind at one time; nor identity in it at different times; whatever natural propensity"—tis indeed natural—"we may have to imagine that simplicity and identity: they are successive perceptions only, that constitute the mind."[g]

On the other hand, Dr. Hartley, assuming the existence of an immaterial principle, and of an external world, has endeavoured to trace the connexion between them. By a chain of hypotheses, he has attempted to illustrate the nature of the impressions, which the senses receive from external objects; the laws, by which those impressions influence our ideas; and the rules of association, by which these ideas are connected in our mind. He has thus formed a system, which, in the opinion of some enlightened men, explains, in a satisfactory manner, most of the operations of the thinking faculty.

Dr. Priestley has embraced these doctrines with his usual warmth; and has propagated them with his well

[g] Tr. on hum. nat. 439. 440.

known zeal. He is of opinion, however, that they ought to be further simplified. A principle, separate from body, he contends is an incumbrance on Dr. Hartley's system. On the principles of deduction, satisfactory to him, he asserts, that to matter, we should ascribe the capacity of intelligence, as well as the property of gravitation. Thought he believes to arise necessarily from a certain organization of the brain; and, resting on this, he denies the existence of an immaterial principle.

Different—exceedingly different indeed—nay, totally irreconcilable are these illustrious men in the conclusions, which they draw. But however widely they differ, however impracticable it may be to reconcile them with regard to their conclusions; they all agree concerning their fundamental principles. They all agree in *assuming* the *existence* of *ideas*. This is the fundamental principle of Mr. Locke's philosophy.

Strange has been the fate of this principle! Strange have been the vicissitudes, with which it has been attended! Strange have been the revolutions, which it has been thought capable of producing! What a powerful engine it has been! In skilful and experienced hands, how tremendous have been its operations! Wielded by one philosopher, it attaches itself solely to matter, and destroys mind. Wielded by another, it attaches itself solely to mind, and destroys matter. Wielded by a third, it becomes equally fatal to matter and mind: by a single fiat of uncreating omnipotence, it strikes body and spirit, time and space into annihilation; and leaves nothing remaining but impressions and ideas!

We have hitherto been apt, perhaps, with unphilosophick credulity, to imagine, that thought supposed a

thinker; and that treason implied a traitor. But correct philosophy, it seems, discovers, that all this is a mistake; for that there may be treason without a traitor, laws without a legislator, punishment without a sufferer. If, in these cases, the *ideas* are the traitor, the legislator, the sufferer; the author of this discovery ought to inform us, whether ideas can converse together; whether they can possess rights, or be under obligations; whether they can make promises, enter into covenants, fulfil, or break them; whether, if they break them, damages can be recovered for the breach. If one set of ideas make a covenant; if another successive set—for be it remembered they are all in succession—break the covenant; and if a third successive set are punished for breaking it; how can we discover justice to form any part of this system? These professional questions naturally suggest themselves.

Will these philosophers forgive me, if, from this dreary prospect—if a view of nothing can be called a prospect—I turn my eyes, and direct them to another scene, not indeed so solemn or awful, but such as, in one particular, bears to it a certain strong, though, perhaps, a ridiculous analogy. I would wish to pay all becoming deference to a system, venerable by its high antiquity, and fortified by the authority of philosophers without number. The images, and species, and phantasms of the ancients, and the ideas of the moderns, I wish to contemplate and treat with all imaginable respect. But there is an unlucky object of comparison, which constantly presents itself to my view. I cannot think of this doctrine of ideas, so versatile in its nature and application, without thinking, at the same time, of another doctrine, which has likewise been uncommonly powerful in its

operations and effects. Shall I be forgiven?—I repeat the question—if, upon this occasion, I introduce—my Lord Peter's brown loaf. His lordship presented it once: it was excellent mutton. He presented it a second time: it was delicious beef. He presented it a third time: it was exquisite plumb pudding.

Shall I be permitted to ask one question—I think, a very natural one—did the brown loaf ever exist? If it never existed at all; my Lord Peter was equally infallible, when he called it mutton, as when he called it plumb pudding; and when he called it plumb pudding, as when he called it mutton or beef.

Shall I be permitted to ask another question—equally natural as the former? These images, and species, and phantasms of the ancients; these ideas of the moderns—did they ever exist? You will unquestionably be surprised when I tell you, that though, from the time of Plato and Aristotle to the time of Berkely and Hume, ideas and species have been supposed to lie at the foundation of the philosophy of the human mind, and, consequently, of all philosophy and knowledge; yet that foundation has never, till lately, been examined; but that the existence of ideas and species has always been assumed as a doctrine taken for granted. You will, perhaps, be further surprised, on being told, that, when lately the rubbish, which, during the long course of two thousand years, had covered and concealed the foundations of philosophy, was removed; and when those foundations were examined by an architect of uncommon discernment and skill; no such things as the ideas of the moderns, or the species of the ancients were to be discovered there.

"I acknowledge," says the enlightened and candid Dr. Reid,[h] "that I never thought of calling in question the principles commonly received with regard to the human understanding, until the Treatise of Human Nature was published." This is the performance of Mr. Hume, from which I cited a passage a little while ago. It appeared in the year 1739. "The ingenious author," continues Dr. Reid, "of that treatise, upon the principles of Locke, who was no sceptick, hath built a system of scepticism, which leaves no ground to believe any one thing rather than its contrary. His reasoning appeared to me to be just: there was, therefore, a necessity to call in question the principles, upon which it was founded; or admit the conclusion.

"But can any ingenious mind admit this sceptical system without reluctance? I truly could not: for I am persuaded that absolute scepticism is not more destructive of the faith of a christian, than of the science of a philosopher, and of the prudence of a man of common understanding."—I may add—or the sound principles of a lawyer or statesman. "I am persuaded," continues the Doctor, "that the unjust live by faith, as well as the just; and that, if all belief could be laid aside, piety, patriotism, friendship, parental affection, and private virtue would appear as ridiculous as knight errantry; and that the pursuits of pleasure, of ambition, and of avarice must be grounded upon belief, as well as those that are honourable and virtuous.

"For my own satisfaction, I entered into a serious examination of the principles, upon which this sceptical

[h] Inq. Ded. 4—8.

system is built; and was not a little surprised to find, that it leans with its whole weight upon a hypothesis, which is ancient indeed and hath been very generally received by philosophers; but of which I could find no solid proof. The hypothesis I mean is, that nothing is perceived but what is in the mind, which perceives it; that we do not really perceive things that are external, but only certain images and pictures of them imprinted upon the mind, which are called *impressions* and *ideas*.

"If this be true; supposing certain impressions and ideas to exist in my mind, I cannot, from their existence, infer the existence of any thing else; my impressions and ideas are the only existences, of which I can have any knowledge or conception, and they are such fleeting and transitory beings, that they can have no existence at all, any longer than I am conscious of them. So that, upon this hypothesis, the whole universe about me, bodies and spirits, sun, moon, stars and earth, friends and relations, all things without exception which I imagined to have a permanent existence, whether I thought of them or not, vanish at once,

> And like the baseless fabrick of a vision,
> Leave not a track behind.

"I thought it unreasonable, upon the authority of philosophers, to admit a hypothesis, which, in my opinion, overturns all philosophy, all religion and virtue, and all common sense; and finding that all the systems concerning the human understanding, which I was acquainted with, were built upon this hypothesis, I resolved to inquire into this subject anew, without regard to any hypothesis."

The fruits of his inquiries have been published; and richly deserve your perusal and attention. Others have sown and cultivated the same seeds of knowledge, with the most encouraging success; and there is reason to hope, that the philosophy of human nature will not much longer continue the reproach of the human understanding.

Monopoly and exclusive privilege are the bane of every thing—of science as well as of commerce. The sceptical philosophers claim and exercise the privilege of assuming, without proof, the very first principles of their philosophy; and yet they require, from others, a proof of every thing by reasoning. They are unreasonable in both points. Some things, which ought to be believed, ought to be believed without proof. The first principle of their philosophy—the existence of ideas—is none of those things. If it be true; it is a discursive, not an intuitive truth; and, therefore, it can be proved. For this reason, unless it be proved, it should not be believed.

After having mentioned the sceptical philosophers, it is with a degree of reluctance that I so soon introduce the respected name of Mr. Locke. I introduce him not as one of those philosophers, but as one, who has unfortunately given a sanction to principles, the consequences of which he certainly did not foresee. But from his principles, those consequences have been ably and unanswerably drawn by others. His principles, therefore, ought to be minutely examined, that we may see whether, on a strict examination, they will stand the test.

I shall examine his leading principle by the very test, which he himself proposes for its trial. Cautious and candid as he was, it is very remarkable, that, while he recommends it to others to be careful in the admission of principles, he admits his own leading principle without sufficient examination and care. "I take leave to say"—I use his own words[i]—"I take leave to say, that every one ought very carefully to beware what he admits for a principle, to examine it strictly, and see whether he certainly knows it to be true of itself by its own evidence; or whether he does only, with assurance, believe it to be so upon the authority of others." And yet he begins his observations on ideas and their original, by assuming their existence, as his leading principle. "Every man being conscious to himself that he thinks; and that which his mind is applied about, whilst thinking, being the *ideas* that are *there*, tis past doubt, that men have in their minds several ideas." "It is, in the *first* place, then, to be inquired *how* he comes by them."[j]

With all deference for the character and talents of Mr. Locke—and I have, indeed, a high respect for them—I think that a previous inquiry ought to have been made—*Does* he come by them? To assume, without proving, that the things, which the mind is applied about, whilst thinking, are the ideas that are *there*; is certainly to assume too much.

In another place,[k] he expresses a hope, that it will be received as an intuitive truth—as one of that species

[i] On hum. Und. b. 4. c. 20. s. 8.

[j] Id. b. 2. c. 1. s. 1. [k] Id. Introd.

of intuitive truths, which arise from consciousness. "I presume," says he, "it will be easily granted me, that there are such ideas in men's minds." Why so easily granted? Why should the leading principle of a philosophy, which, if true, necessarily draws us to such consequences as have been represented—why should such a leading principle be taken on trust? "Because," continues Mr. Locke,[1] "every one is conscious of them in himself."

Here is a fair and candid appeal: for if every one is conscious of ideas in his own mind, he must believe that such ideas are *there:* for consciousness is unquestionably a first principle of evidence. In this appeal I have the pleasure of joining with Mr. Locke. In one thing we certainly agree—the object of both is to discover the truth. Of this truth, you shall be the judges, or rather the triers between us; for consciousness is a matter of fact.

But before we enter upon the trial of this appeal, let us be sure that the point to be tried is clearly ascertained and understood: let us not be misled by verbal ambiguity, nor drawn into the field of verbal disputation. Many errours, and some of no inconsiderable importance, have arisen from the vague, the doubtful, or the inaccurate application of the term *idea.*

By ideas are sometimes meant the acts or operations of our minds in perceiving, remembering, or imagining objects. In this sense, the existence of ideas is far from being called in question. We are conscious of them every day and every hour of our lives.

[1] On Hum. Und. b. 1. c. 1. s. 8.

Sometimes *idea* is used to denote *opinion*—Thus, when we speak of the ideas of Cicero; we mean his opinions or doctrines.

But there is a third sense, in which the term *idea* has been used. It has been used to denote those images and pictures of things, which, and not the things themselves, are the immediate objects perceived by the mind. Those, who speak the most intelligibly, explain their doctrine in this manner. Suppose me to look at a mirrour; and, while I am looking at it, suppose a person to come behind me; I see, in the mirrour, not the person himself, but his image. In the same manner, when, without a mirrour, I am supposed to see a house or a tree; I see only an image of those objects in my mind. This image is the immediate object of my perception.

It is in this last sense, now explained, that an appeal is made to your consciousness for the truth of the existence of ideas.

You look at me: now I call for your conscious verdict. Are you conscious, that you really see me: or are you conscious, that you see, not me, but only a certain image or picture of me, imprinted upon your own minds? If the latter; your consciousness decides in favour of Mr. Locke: if the former; it decides in favour of me. In whose favour does your verdict decide? Before you finally declare it, it may, perhaps, be urged, that you perceive me by means of intervening resemblances of me, distinctly painted on the retinæ of your eyes.

This shows, that I am willing to give the cause an impartial trial, nay, an advantageous one, on the side of

my admired antagonist. From those parts only of our knowledge, which are disclosed by the sense of seeing, could this objection be urged.

I admit, that the resemblances mentioned are distinctly painted on the retinæ of your eyes. But suffer me to ask you—do you *perceive* those resemblances, *so* painted? I presume you do not: for the existence of those resemblances was never, so far as I know or have heard, perceived by any of the innumerable race of men: it was not so much as suspected, till in the last century. Then the discovery was made by Kepler: but even to Kepler the discovery was not disclosed by consciousness: it was the result of deep and accurate researches into the philosophy of vision.

But I have not yet done with my answer to this objection. That you do not perceive me by the intervention of any perception of the resemblances painted on the retinæ of the eyes, is evident from two circumstances. In the first place, the resemblances of me are painted on the retinæ of both eyes: therefore, if you saw me through the intervention of those resemblances, you would see me double. In the second place, the resemblances of me on the retinæ are inverted: therefore, if you saw me through the intervention of those resemblances, you would see me turned upside down.

Are you now ready finally to declare your verdict? Do you perceive me? or do you only perceive, in your own minds, an image or picture of me?

I presume I may say, that the existence of ideas is not the dictate of consciousness. Is the existence of

ideas entitled, in any other manner, or from any other source, to be considered as an intuitive truth? I have not heard it suggested. If it is a truth, and not an intuitive one; it is a truth capable of being proved: if it is capable of being proved; it ought to be proved, as we have already said, before it be believed.

A proof has been attempted: let us examine it. "No being, it is said, can act or be acted upon, but where it is; and, consequently, our mind cannot act upon, or be acted upon by any subject at a distance."[m]

This argument possesses one eminent advantage: its obscurity, like that of an oracle, is apt to impose on the hearer, who is willing to consider it as demonstration, because he does not, at first, discover its fallacy. Let it undergo a fair examination; let it be drawn out of its obscurity: let it be stated and analyzed in a clear point of view. Then it will appear as follows.

"No subject can be perceived, unless it acts upon the mind, or is acted upon by the mind: but no distant object can act upon the mind, or be acted upon by the mind; for no being can act but where it is: therefore the immediate object of perception must be something in the mind, so as to be able to act upon, or to be acted upon by the mind."

Now you see, fairly stated in all its parts, the argument, which is supposed to prove the necessity of phantasms or ideas in the mind, as the only objects of perception. It is singularly unfortunate for this argu-

[m] Reid's Ess. Int. 203. 2 Elem. Crit. 513. n.

ment, that it concludes directly against the very hypothesis, of which it is the only foundation: for how can phantasms or ideas be raised in the mind by things at a distance, if things at a distance cannot act upon, or be acted upon by the mind.

Again; the argument assumes a proposition as true, without evidence—that no distant subject can act upon, or be acted upon by the mind. This proposition requires evidence; for it is not intuitively certain. Till this proposition, therefore, be proved, every man may rationally rely upon the conviction of his senses, that he sees and hears objects at a distance.

But further; to render the foregoing argument conclusive, it ought to be proved, that when we perceive objects, either they act upon us, or we act upon them. This is not selfevident; nor is it proved. Indeed reasons may be well offered against its admission.

When we say, that one being acts upon another, we mean that some power is exerted by the agent, which produces, or tends to produce a change in the thing acted upon. Now, there appears no reason for asserting, that, in perception, either the object acts upon the mind, or the mind upon the object. An object, in being perceived, does not act at all. I perceive the desk before me; but it is perfectly inactive; and, therefore, cannot act upon my mind. Neither does the mind, in perception, act upon the object. To perceive an object is one thing: to act upon it is another thing. To say, that I act upon the paper before me, when I look at it, is an abuse of language. We have, therefore, no evidence, that, in perception, the mind acts upon the object, or

the object upon the mind; but strong evidence to the contrary. The consequence is, that the very foundation of the only argument brought to prove the existence of ideas is sandy and unsound.

Thus the first principle of the ideal philosophy is supported neither by intuition nor by proof. On what pretension, then, can it lay any just claim to our regard?

And yet this principle, unsupported, absurd, and unphilosophical as it is, will, I believe, be found to be the sole foundation laid, so far as any is laid, in our law-books, for the philosophy of the law of evidence. My Lord Chief Baron Gilbert, the most approved, and deservedly the most approved writer on this part of the law, grounds his general observations on the doctrine of Mr. Locke, that knowledge is nothing but the perception of the agreement or disagreement of our *ideas*.[n]

In one of my early lectures,[o] I made the following observations. "Despotism, by an artful use of 'superiority' in politicks; and scepticism, by an artful use of 'ideas' in metaphysicks, have endeavoured—and their endeavours have frequently been attended with too much success—to destroy all true liberty and sound philosophy. By their baneful effects, the science of man and the science of government have been poisoned to their very fountains. But those destroyers of others have met, or must meet with their own destruction." I have put you in possession of materials to judge for yourselves whether these observations are or are not well founded.

[n] Gilb. Ev. 1—3. [o] Ante. p. 67.

At first sight, it would seem strange that the principles of law, as they are laid down in a book, which is very generally received for authority, should be destructive of liberty; and that the principles of the philosophy of the human mind, as they likewise are generally received and taught, should be subversive of all truth and knowledge. But after what we have seen; is it not as true as strange?

This investigation has cost me some trouble: to you I hope it will be attended with some advantage. I thought it my duty to make and to communicate it; because, without it, any superstructure of system, which I could build, would not satisfy me as resting on a solid foundation. Could I have been justified in palming upon you a system leaning on such principles as do not satisfy myself?

I know very well, that, in the business of life, the dictates of common sense will always, and that in the business of government, the spirit of liberty will sometimes prevail over false theories of politicks and philosophy. But is this a reason why those false theories should be received, or encouraged, or propagated? Ought not our conduct as men and as citizens to receive benefit instead of detriment from the systems of our education? One, whose practice is in diametrical opposition to his principles, stands always in an awkward, often in a painful, sometimes in a dangerous situation.

I have said, that the spirit of liberty will sometimes prevail over false theories of politicks. Unhappily I could not say more: I could not say, generally: far less could I say, always. Let us look around us and behold

the sons of men, who inhabit this globe. What an immense proportion of them are the wretched slaves of perverted opinion, of perverted system, of perverted education, and of perverted example in matters relating to the principles of society, and the rights of the human kind!

I hope I have now shown, that the philosophers before mentioned unreasonably claimed the exclusive privilege of assuming the first principle of their philosophy, without proof: I now proceed to show, that they are equally unreasonable in requiring, from others, a proof of every thing by reasoning.

The defects and blemishes of the received philosophy, which have most exposed it to ridicule and contempt, have been chiefly owing to a prejudice of the votaries of this philosophy in favour of reason. They have endeavoured to extend her jurisdiction beyond its just limits; and to call before her bar the dictates of common sense. But these will not submit to this jurisdiction: they plead to its authority; and disdain its trial; they claim not its aid; they dread not its attacks.

In this unequal contest between reason and common sense, the former will always be obliged to retreat both with loss and with dishonour; nor can she ever flourish, till this rivalship is dropt, till these encroachments are given up, and till a cordial friendship is restored. For, in truth, reason has no other root than the principles of common sense: it grows out of them: and from them it draws its nourishment.

There are some common principles, which are the foundation of all science, and of all reasoning. Before

men can argue together, they must agree in such principles; for it is impossible for two to reason, but from principles held by them in common. Such common principles seldom admit of direct proof; they need none; they are such as men of common understanding will acknowledge as soon as they are proposed and understood.

Such principles, when we have occasion to use them in science, are called *axioms*. Upon such, the finest, the most elaborate, and the most sublime reasonings in mathematicks are founded.

In every other science, as well as in mathematicks, there are some common principles, upon which all the reasonings in that science are grounded, and into which they may be resolved. If these were pointed out and considered, we should be better able to judge concerning the strength and certainty of the conclusions in that science.

It is not impossible, that what is only a vulgar prejudice may be mistaken for a first principle. Nor is it impossible, that what is really a first principle, may, by the enchantment of words, have such a mist thrown about it, as to hide its evidence, and make a man of candour doubt concerning it.

The peripatetick philosophy, instead of being deficient, was redundant in first principles; instead of rejecting those, which are truly such, it adopted, as such, many vulgar prejudices and rash judgments. This seems, in general, to have been the spirit of ancient philosophy.

How naturally one extreme produces its opposite! Des Cartes, at the head of modern reformers in philosophy, anxious to avoid the snare, in which Aristotle and the peripateticks had been caught—that of admitting things too rashly as first principles—resolved to doubt of every thing, till it was clearly proved. He would not assume, as a first principle, even his own existence. In what manner he supposed nonexistence could institute, or desire to institute a series of proof to prove existence or any thing else, we are not informed.

He thought he could prove his existence by his famous enthymem—Cogito, ergo sum. I think, therefore, I exist. Though he would not assume the existence of *himself* as a first principle, he was obliged to assume the existence of his *thoughts* as a first principle. But is this entitled to any degree of preference? Can one, who doubts whether he exists, be certain that he thinks? And may not one, who, without proof, takes it for granted that he thinks—may not such an one, without the imputation of unphilosophick credulity, take it for granted, likewise without proof, that he exists?

In every just proof, a proposition less evident is inferred from one, which is more evident. How is it more evident that we think, than that we exist? Both are equally evident: one, therefore, ought not to be first assumed, and then used as a proof of the other.

But further; if we attend to the strict rules of proof; the existence of Des Cartes was not legitimately inferred from the existence of his thoughts. If the inference is legitimate; it must become legitimate by establishing this proposition—that thought cannot exist

without a thinking being. But did Des Cartes, or has any of his followers proved this proposition? They have not proved it: they cannot prove it. Mr. Hume has denied it; and has triumphantly challenged the world to establish it by proof. The basis of his philosophy is, as we have already seen—"that a train of successive perceptions constitute the mind."

Let me not here be misunderstood. When I say, that the existence of a thinking principle, called the mind, has not been and cannot be proved; I am far from saying, that it is not true, that such a thinking principle exists. I know—I feel—it to be true; but I know it not from proof: I know it from what is greatly superiour to proof: I *see* it by the shining light of intuition.

Why will philosophers, by a preposterous pride, wish and endeavour to be indebted, for the discovery of every thing, to the feeble and glimmering rays of their own tapers, when they have only to throw the window open, and they will behold every thing illuminated by the splendour of the meridian sun?

Let me, upon this subject, further observe, that strongly as Des Cartes was seized with this phobia of first principles, he was obliged, in one instance at least, to suffer the detested liquid to touch his lips. Cogito, says he: I think. You think! How do you prove that? You, who will not believe your own existence without proof—can you consistently dispense with the proof of the existence of your thoughts? He is obliged to submit to the inconsistency. He assumes the existence of his thoughts, as a first principle. Why did he not pursue the same course with regard to other intuitive truths?

As the last observation on this subject, I beg leave to take notice, that, in this remarkable enthymem, Des Cartes assumed the very thing to be proved. Cogito. *I* think. Who *are you?* Existence is implied in the very proposition, that *one* thinks.

To the distinction between first principles and those principles, which may be ascribed to the power of reasoning, it is not a just objection, that there may be some judgments, concerning which we may be doubtful, to which class they should be referred. In painting and in nature, two colours, very different, may so run into one another, as to render it difficult to perceive where one ends and the other begins.

Let us then conclude—for we may safely conclude—that all knowledge, obtained by reasoning, must be built on first principles. When we examine, by analysis, the evidence of any proposition; we find, either that it is selfevident; or that it rests upon one or more propositions, which support it. The same thing may be said of the propositions, which support it; and of those again, which support them. But we cannot go back, in this tract, to infinity. Where, then, must the analysis stop? When we come to propositions, which support all that are built upon them, but are themselves supported by none: in other words, when we come to selfevident propositions.

All first principles must be the immediate dictates of our natural faculties; nor is it possible that we should have any other evidence of their truth. In different sciences, the faculties, which dictate these first principles, are very different: the eye, in astronomy and opticks: the ear, in musick: the moral sense, in morals.

Some first principles yield conclusions, which are certain; others yield such only as are probable. In just reasoning, the strength or weakness of the conclusion will always correspond to the strength or weakness of the principles, on which it is grounded. But the lowest degree of probability, as well as absolute certainty, must be grounded ultimately on first principles.

After hearing so much concerning first principles, the question will naturally suggest itself—are they ascertained and pointed out? That they were so, is most ardently to be desired. In mathematicks, they have been so, as far back as the annals of literature can carry us. And the consequence has been, that, in mathematicks, we find no sects, or contrary systems. This science, founded upon first principles, as upon a rock, has been increased from age to age, till it has become the loftiest and most solid fabrick, which human reason can boast.

Till within these two hundred years, natural philosophy was in the same fluctuating state with the other sciences. Every new system pulled up the old one by the roots. The great Lord Bacon first marked out the only foundation, on which natural philosophy could be built. His celebrated successour, Sir Isaac Newton, gave the first and noblest examples of that chaste induction, of which his guide in the principles of science could only delineate the theory. He reduced the principles of Lord Bacon into a few axioms, which he calls "regulæ philosophandi,"—rules of philosophising. From these, together with the phenomena observed by the senses, which he likewise assumes as first principles, he deduces, by strict reasoning, the propositions of his philosophy; and, in this manner, has erected an edifice,

which stands immovable upon the basis of first and self-evident principles. This edifice has been enlarged by the accession of new discoveries, made since his time; but it has not been subjected to alterations in the plan.

The other sciences have not, as yet, been so fortunate as those of mathematicks and natural philosophy. Indeed the other sciences, compared with these, have this disadvantage, that it is more difficult to form distinct and determinate conceptions of the objects, about which they are employed. But this difficulty, though great, is not insurmountable: it may afford a reason why the other sciences have had a longer infancy; but it can afford none, why they may not, at last, arrive at maturity by the same steps as those of a quicker growth.

If the same unanimity concerning first principles could be introduced into the other sciences, as in those of mathematicks and natural philosophy; this might be considered as a new era in the progress of human reason. [p]

Some first principles I have already had occasion to notice: in the course of my system, others will come forward into view; and will receive particular attention; especially in the important law of evidence, upon which the practical use of the whole municipal law entirely rests. For the facts must be ascertained by evidence, before they are susceptible of an application of the law. "Ex facto oritur jus." How can facts be satisfactorily

[p] Reid's Inq. 483.

established, unless the genuine philosophy of evidence be known?

Investigation will, perhaps, disclose to us, that this part of philosophy has been best known, where the knowledge of it has been least expected.

CHAPTER VII.

OF MAN, AS A MEMBER OF SOCIETY.

"IT is not fit that man should be alone," said the all-wise and all-gracious Author of our frame, who knew it, because he made it; and who looked with compassion on the first solitary state of the work of his hands. Society is the powerful magnet, which, by its unceasing though silent operation, attracts and influences our dispositions, our desires, our passions, and our enjoyments. That we should be anxious to share, and, by sharing, to divide our afflictions, may, to some, appear by no means strange, because a certain turn of thinking will lead them to ascribe this propensity to the selfish rather than to the social part of our nature. But will this interested solution account for another propensity, equally uniform and equally strong? We are no less impatient to communicate our pleasures than our woes. Does self-interest predominate here? No. Our social affection acts here unmixed and uncontrolled.

There's not a blessing individuals find,
But some way leans and hearkens to the kind.
No bandit fierce, no tyrant mad with pride,
No caverned hermit rests self-satisfied.
Who most to shun or hate mankind pretend,
Seek an admirer, or would fix a friend.
Abstract what others feel, what others think,
All pleasures sicken, and all glories sink.[a]

In all our pictures of happiness, which, at certain gay and disengaged moments, appear, in soft and alluring colours, to our fancy, does not a partner of our bliss always occupy a conspicuous place? When, on the other hand, phantoms of misery haunt our disturbed imaginations, do not solitary wanderings frequently form a principal part of the gloomy scenes? It is not an uncommon opinion, and, in this instance, our opinions must be vouched by our feelings, that the most exquisite punishment, which human nature could suffer, would be, in total solitude, to languish out a lengthened life.

"These deep solitudes" is the circumstance that first bursts from the labouring bosom of the cloistered Eloisa, when she describes the "awful cells," where "ever musing melancholy reigns."

How various and how unwearied are the workings of the social aim! Deprived of one support, it lays hold on another: deprived of that other, it lays hold on another still. While an intelligent, or even an animate being can be found, it will find an object for its unremitted pursuit and attachment.

[a] Pope's Ess. Man. Ep. 4. v. 39.

We may extract sweet lessons of liberty and sociability from the prison of barbarous and despotick power. A French nobleman was long immured in a dreary and solitary apartment. When he had uttered many an unavailing sigh after society, he, at last, was fortunate enough to discover a spider, who had taken up his abode in the same room. Delighted with the acquisition, he immediately formed a social intercourse with the joint inhabitant of his sequestered mansion. He enjoyed, without molestation, this society for a considerable time. But the correspondence was, at last, discovered by his keeper, long tutored and accustomed to all the ingenious inventions and refinements of barbarity. By an effort, which evinced him a consummate master of his art, he killed the spider, and reduced his prisoner again to absolute solitude. The nobleman, after his release, used frequently to declare, that he had seldom experienced more poignant distress, than what he had suffered from the loss of his companion in confinement.

Some philosophers, however, have alleged, that society is not natural, but is only adventitious to us; that it is the mere consequence of direful necessity; that, by nature, men are wolves to men; not wolves to wolves; for between them union and society have a place; but as wolves, to sheep, destroyers and devourers. Men, say they, are made for rapine; they are destined to prey upon one another: each is to fight for victory, and to subdue and enslave as many of his fellow creatures, as he possibly can, by treachery or by force. According to these philosophers, the only natural principles of man are selfishness, and an insatiable desire of tyranny and dominion. Their conclusion is, that a state of nature, instead of being a state of kindness, society, and peace, is

a state of selfishness, discord, and war. By a strange perversion of things, they would so explain all the social passions and natural affections, as to denominate them of the selfish species. Humanity and hospitality towards strangers or those in distress are represented as selfishness, only of a more deliberate kind. An honest heart is only a cunning one; and good nature is a well regulated self-love. The love of posterity, of kindred, of country, and of mankind—all these are only so many different modifications of this universal self-love.

But if we attend to our nature and our state; if we listen to the operations of our own minds, to our dispositions, our sensations, and our propensities; we shall be fully and agreeably convinced, that the narrow and hideous representation of these philosophers is not founded on the truth of things; but, on the contrary, is totally repugnant to all human sentiment, and all human experience. Indeed, an appeal to themselves will evince, that their philosophy is not consistent even with the instinctive principles of their own hearts—principles, of which the native lustre will, at some times, beam forth, notwithstanding all the care employed to cover or extinguish it. The celebrated Sage of Malmesbury, savage and unsociable as he would make himself and all mankind appear, took the utmost pains that, during his life, and even after his death, others might be kindly rescued from the unhappy delusions, by which they were prevented from discovering the truth. [b] He told us "that both in religion and in morals, we were imposed on by our governours; that there is nothing, which, by nature, inclines us either way; and that nothing naturally draws us to

[b] 1. Shaft. Char. 90.

the love of what is without or beyond ourselves." And yet he was the most laborious of all men in composing and publishing systems of this kind—*for our use.*

To such philosophers, animated with this preposterous zeal, this answer, in the spirit of their own doctrines, is plain and easy. If there is nothing to carry you without yourselves; what are we to you? From what motives do you give yourselves all this concern about us? What can induce you to trim your midnight lamp, and waste your spirits in laborious vigils, for our instruction? You disclaim all social connexion with your species; what, then, we say again, are we to you?

But a subject, in itself so material to the sciences of philosophy and of law, merits a serious, a full, and a patient discussion. For it is of high practical importance, that the principles of society should be properly explained and well understood. It has been one of the happy characteristicks of the present age, both on this and on the other side of the Atlantick, that the spirit of philosophy has been wisely directed to the just investigation of those principles; and that the spirit of patriotism has been vigorously exerted in their support.

In a very early part of these lectures,[c] it was observed, concerning definitions and divisions, that by them we are in danger of circumscribing nature within the limits of our own notions, formed frequently on partial and defective views. A very remarkable instance of this occurs in the subject, on the examination of which we now enter.

[c] Ante. p. 58.

The intellectual powers of the mind have been commonly divided into simple apprehension, judgment, and reasoning. This division has received the sanction of high antiquity, and of a very extensive adoption; yet it is far from being complete. From it many of the operations of the understanding are excluded, such as consciousness, moral perception, taste, memory, and our perception of objects by means of our external senses. But, besides all these, there is a whole class, and a very important one too, of our intellectual operations, which, because they were not fortunate enough to be included within the foregoing division, have been overlooked by philosophers, and have not even yet been distinguished by a name. Some operations of the mind may take place in a solitary state: others, from their very nature, are social; and necessarily suppose a communication with some other intelligent being. In a state of absolute solitude, one may apprehend, and judge, and reason. But when he bears or hears testimony; when he gives or receives a command; when he enters into an engagement by a promise or a contract; these acts imply necessarily something more than apprehension, judgment, and reasoning; they imply necessarily a society with other beings, social as well as intelligent.

Simple apprehension is unaccompanied with any judgment or belief, concerning the object apprehended. Judgment is formed, as these philosophers say, by comparing ideas, and by perceiving their agreements and disagreements. Reasoning is an operation, by which, from two or more judgments, we deduce a conclusion. Now, from this account of these three operations of the mind, it appears unquestionably, that testimony is neither apprehension, nor judgment, nor reasoning. The

same observation will apply, with the same propriety, to a promise, to an agreement, to a contract. Testimony, agreements, contracts, promises form very distinguished titles in that law, which it is the object of these lectures to delineate: perhaps it has already been evinced to your satisfaction, that some of them form its very basis.

That system of human nature must, indeed, appear extremely inadequate and defective, by which articles of such vast importance, both in theory and in the business of life, are left without a place, and without a name.

The attempts of some philosophers to reduce the social operations under the common philosophical divisions, resemble very much the attempts of others, to reduce all our social affections to certain modifications of self love. The Author of our existence intended us to be social beings; and has, for that end, given us social intellectual powers. They are original parts of our constitution; and their exertions are no less natural than the exertions of those powers, which are solitary and selfish.

Our social intellectual operations appear early in life, and before we are capable of reasoning; yet they suppose a conviction of the existence of other intelligent and social beings. A child asks a question of his nurse, and waits for her answer: this implies a conviction that she is intelligent and social; that she can receive and return a communication of thoughts and sentiments.

All languages are fitted to express the social as well as the solitary operations of the mind. To express the former is indeed the primary and the direct intention of language. A man, who had no interchange of sentiments with other social and intelligent beings, would be as mute as the irrational animals that surround him. By language, we communicate to others that, which we know: by language, we learn from others that, of which we are ignorant: by language, we advise, persuade, console, encourage, sooth, restrain: in consequence of language, we are united by political societies, government, and laws: by means of language, we are raised from a situation, in which we should be as rude and as savage as the beasts of the woods.

In the more imperfect societies of mankind, such as those composed of colonies scarcely settled in their new seats, it might pass for sufficient good fortune, if the people proved only so far masters of language, as to be able to understand one another, to confer about their wants, and to provide for their common necessities. Their exposed and indigent state would not afford them either that leisure or that easy disposition, which is requisite for the cultivation of the fine arts. They, who were neither safe from violence, nor secure from want, would not be likely to engage in unnecessary pursuits. It could not be expected that they would turn their attention towards the numbers of their language, or to its best and most perfect application and arrangement. But when, in process of time, the affairs of the society were settled on an easy and secure foundation; when debates and discourses, on the subjects of common interest and of publick good, were become familiar; when the speeches of distinguished characters

were considered and compared; then there would be observed, between one speaker and another, a difference, not only with regard to a more agreeable measure of sound, but to a happier and more easy arrangement of sentiment.

The attention paid to language is one distinguishing mark of the progress of society towards its most refined period: as society improves, influence is acquired by the means of reasoning and discourse: in proportion as that influence is felt to increase, in proportion will be the care bestowed upon the methods of expressing conceptions with propriety and elegance. In every polished community, this study has been considered as highly important, and has possessed a place in every plan of liberal education.

In all languages, a question, a promise, a contract, which are social acts, can be expressed as easily and as properly, as a judgment, which is a solitary act. The expression of a judgment has been dignified with a particular appellation; it has been denominated a *proposition*. It has been analyzed, with great logical parade, into its several parts: its elements of subject, predicate, and copula have been exhibited in ostentatious arrangement: their various modifications have been traced and examined in laborious and voluminous tracts. The expression of a question, of a covenant, or of a promise is as susceptible of analysis as the expression of a judgment: but this has not been attempted; these operations of the mind have not been honoured even with a distinct and appropriate name. Why has so much pains been taken, why has so much labour been bestowed in analyzing, and assigning appropriate names

to the solitary operations, and the expression of the solitary operations of the understanding; while so little attention has been allotted to such of its operations as are social? Perhaps it will be difficult to assign any other reason than this: in the divisions, which have been made of the operations of the mind, the social ones have been omitted; and, consequently, have not been introduced to notice or regard.

Our moral perceptions, as well as the other powers of our understanding, indicate, in the strongest manner, our designation for society. Veracity, and its corresponding quality, confidence, show this, in a very striking point of view. If we were intended for solitude, those qualities could have neither operation nor use. On the other hand, without those qualities, society could not be supported. Without the latter, the former would be useless: without the former, the latter would be dangerous. Without confidence in promises, for instance, we must, in the greatest part of our conduct, proceed entirely upon the calculations of chance: but there could be no confidence in promises, if there was no principle, from which their performance might be reasonably expected.

Some may imagine, that though this principle did not exist, yet human affairs might, perhaps, be carried on as well; for that general caution and mutual distrust would be the necessary result; and where no confidence would be reposed, no breach of it could happen. But, not to mention the uneasiness and anxiety which would unavoidably attend such a situation, it is not considered how much, in every hour of our lives, we trust to others; and how difficult, if not entirely impracticable, it would

be to perform the most common as well as the most important business of human life, without such trust. The conclusion is, that the performance of promises is essential to society.

Deeply laid in human nature, we now behold the basis of one of the principal pillars of private municipal law; that, which enforces the obligation of promises, agreements, and covenants.

Again; the moral sense restrains us from harming the innocent: it teaches us, that the innocent have a right to be secure from harm. These are two great principles, which prepare us for society; and, with regard to them, the moral sense discovers peculiar inflexibility: it dictates, that we should submit to any distress or danger, rather than procure our safety and relief by violence upon an innocent person.

Similar to the restraint, respecting personal safety and security, is the restraint, which the moral sense imposes on us, with regard to property. Robbery and theft are indulged by no society: from a society even of robbers, they are strictly excluded.

The necessity of the social law, with regard to personal security, is so evident, as to require no explanation. Its necessity, with regard to property, will be explained and made evident by the following remarks.

Man has a natural propensity to store up the means of his subsistence: this propensity is essential, in order to incite us to provide comfortably for ourselves, and for those who depend on us. But this propensity would be

rendered ineffectual, if we were not secured in the possession of those stores which we collect; for no one would toil to accumulate what he could not possess in security. This security is afforded by the moral sense, which dictates to all men, that goods collected by the labour and industry of individuals are their property; and that property ought to be inviolable.

We beheld, a little while ago, one of the principal pillars of *civil* law founded deeply in our nature: we now perceive the great principles of *criminal* law laid equally deep in the human frame. Violations of property and of personal security are, as we shall afterwards show particularly, the objects of that law. To punish, and, by punishing, to prevent them, is or ought to be the great end of that law, as shall also be particularly shown.

That we are fitted and intended for society, and that society is fitted and intended for us, will become evident by considering our passions and affections, as well as by considering our moral perceptions, and the other operations of our understandings. We have all the emotions, which are necessary in order that society may be formed and maintained: we have tenderness for the fair sex: we have affection for our children, for our parents, and for our other relations: we have attachment to our friends: we have a regard for reputation and esteem: we possess gratitude and compassion: we enjoy pleasure in the happiness of others, especially when we have been instrumental in procuring it: we entertain for our country an animated and vigorous zeal: we feel delight in the agreeable conception of the improvement and happiness of mankind.

The centre mov'd, a circle straight succeeds,
Another still, and still another spreads.
Friend, parent, neighbour first it will embrace,
His country next, and next all human race;
Wide and more wide, th' o'erflowings of the mind
Take ev'ry creature in, of ev'ry kind;
Earth smiles around, with boundless bounty blest,
And heav'n beholds its image in his breast.[d]

How naturally, and sometimes how strongly, are our passions communicated from one to another, without even the least knowledge of the cause, by which they were originally produced! They are conveyed by aspect: the very countenance is infectious: the emotion flies from face to face: it is no sooner seen than experienced: like the electrick shock, it is felt instantaneously by a whole multitude; though, perhaps, only one of them knows from whence it proceeds. Such is the force of society in the passions.

This sympathy is an important quality of many of our passions: in particular, it invites and produces a communication of joys and sorrows, hopes and fears. Spirits, the most generous and the most susceptible of strong impressions, are the most social and combining. They delight most to move in concert; and feel, in the strongest manner, the force of the confederating charm.

The social powers and dispositions of our minds discover themselves in the earliest periods of life. So soon as a child can speak, he can ask, and he can answer a question: before he can speak, he shows signs of love, of resentment, and of other affections necessarily pointed to society. He is capable of social intercourse long

[d] Pope's Ess. on Man. Ep. 4. v. 365.

before he is capable of reasoning. We behold this charming intercourse between his mother and him, before he is a year old. He can, by signs, ask and refuse, threaten and supplicate. In danger, he clings to his mother—for I will not, on this occasion, distinguish between the mother and the nurse—he enters into her joy and grief, is happy in her caresses, and is unhappy in her displeasure.

As sociability attends us in our infancy; she continues to be our companion through all the variegated scenes of our riper years. By an irresistible charm, she insinuates herself into the hearts of every rank and class of men, and mixes in all the various modes and arrangements of human life. Let us suppose a man of so morose and acrimonious a disposition, as to shun, like Timon of Athens, all communication with his species; even such a misanthropist would wish for at least one associate, into whose bosom he might discharge the rancour and virulence of his own heart.

Society is necessary as well as natural to us. To support life, to satisfy our natural appetites, to obtain those agreeable enjoyments of which our nature is susceptible, many external things are indispensable. In order to live with any degree of comfort, we must have food, clothing, habitations, furniture, and utensils of some sort. These cannot be procured without much art and labour; nor without the friendly assistance of our fellows in society.

Let us suppose a man of full strength, and well instructed in all our arts of life, to be reduced suddenly to solitude, even in one of the best of soils and climates:

could he procure the grateful conveniences of life? It will not be pretended. Could he procure even its simple necessaries? In an ingenious and excellent romance, we are told this has been done. But it will be remembered, that the foundation of Robinson Crusoe's future subsistence, and of all the comforts which he afterwards provided and collected, was laid in the useful instruments and machines, which he saved from his shipwreck. These were the productions of society.

Could one, uninstructed in our arts of life, and unfurnished with the productions of society, subsist in solitude, though he were of full age, and possessed of health and strength? the probabilities would run strong against him.

Could one subsist in solitude during the weak, uninformed, and inexperienced period of his infancy? This he could not do, unless, like another Romulus and Remus, he owed his subsistence to the social aid of the wolves.

But let us, for a moment, suppose, that food, raiment, and shelter were supplied even by a miracle; a solitary life must be continually harassed by dangers and fears. Suppose those dangers and fears to be removed; could he find employment for the most excellent powers and instincts of his mind? Could he indulge affection or social joy? could he communicate, or could he receive social pleasure or social regard? Dispositions very different indeed—sour discontentment, sullen melancholy, listless languor—must prey upon his soul.

The reciprocal assistance of those, who compose a single family, may procure many of the necessaries of life; and may diminish its dangers. In this state some room will be afforded for social enjoyments, and for the finer operations of the mind. Still greater pleasures and advantages would be obtained by the union of a few families in the same neighbourhood. They would undertake and execute laborious works for the common good of all; and social emotions would operate in a less contracted circuit. Associations, still larger, will enlarge the sphere of pleasure and enjoyment; and will furnish more diversified and delightful exercise to our powers of every kind. Knowledge is increased: inventions are discovered: experience improves them: and the inventions, with their improvements, are spread over the whole community. Designs of durable and extensive advantage are boldly formed, and vigorously carried into effect. The social and benevolent affections range in an ample sphere; and attain an eminent degree of strength and refinement.

On what does our security—on what do our enjoyments depend? On our mutual services and sympathetick pleasures. Other animals have strength or speed sufficient for their preservation and defence. Man is, in all states, encompassed with weakness and dangers: but the strength and safety, which he wants by himself, he finds, when he is united with his equals. Nature has endowed him with a principle, which gives him force and superiority, where otherwise he would be helpless and inferiour. By sociability, they, who separately could make no effectual resistance, conquer and tame the various kinds of the brute creation. Society is the cause, that, not satisfied with the element on which he was

born, man extends his dominion over the sea. Society supplies him with remedies in his diseases, with comfort in his afflictions, and with assistance in his old age. Take away society, and you destroy the basis, on which the preservation and happiness of human life are laid.

"There is nothing more certain," says Cicero,[c] "than the excellent maxim of Plato—that we are not intended solely for ourselves; but that our friends and our country claim a portion of our birth. Since, according to the doctrine of the stoicks, the productions of the earth are designed for men, and men are designed for the mutual aid of one another; we should certainly pursue the design of Nature, and promote her benign intention, by contributing our proportion to the general interest, by mutually performing and receiving good offices, and by employing our care, our industry, and even our fortune, in order to strengthen the love and friendship, which should always predominate in human society."

In point of dignity, the social operations and emotions of the mind rise to a most respectable height. The excellency of man is chiefly discerned in the great improvements, of which he is susceptible in society: these, by perseverance and vigour, may be carried on progressively to degrees higher and higher, above any limits which we can now assign.

Our social affections and operations acquire still greater importance, in another point of view: they promote

[c] De off. l. 1. c. 7.

and are necessary to our happiness. "If we could suppose ourselves," says Cicero,[f] who knew so well how to illustrate law by philosophy—"if we could suppose ourselves transported by some divinity into a solitude, replete with all the delicacies which the heart of man could desire, but excluded, at the same time, from every possible intercourse with our kind, there is not a person in the world of so unsocial and savage a temper, as to be capable, in these forlorn circumstances, of relishing any enjoyment." "Nothing," continues he, "is more true, than what the philosopher Archytas is reported to have said: If a man were to be carried up into heaven, and see the beauties of universal nature displayed before him, he would receive but little pleasure from the wonderful scenes, unless there was some person, to whom he could relate the glories, which he had viewed. Human nature is so constituted, as to be incapable of solitary satisfactions. Man, like those plants which are formed to embrace others, is led, by an instinctive impulse, to recline on those of his own kind."

> Man, like the gen'rous vine, supported lives;
> The strength he gains is from th' embrace he gives.[g]

The observations, which we make in common life, vouch the justness of these sentiments. We see those persons possess the greatest share of happiness, who have about them many objects of love and endearment. To the want of these objects, may be ascribed the moroseness of monks, and of those who, without entering into any religious order, lead the lives of monks.

[f] De Amic. 23. [g] Pope's Ess. on Man. Ep. 3. v. 311.

Of the same nature with the indulgence of domestick affections, and equally refreshing to the spirit, is the pleasure, which flows from acts of beneficence, either in bestowing pecuniary favours, or in imparting, to those who want it, the benefit of our advice, or the assistance of our professional skill. The last consideration is urged, with peculiar propriety, by the professor of law. Innumerable instances occur, in which gentlemen of the bar, who possess abilities and character, can bestow what may be called favours, even on those, who are both able and willing to pay well for their services. When a client has an important business depending, entire confidence in the integrity and talents of his counsel diffuses over his mind a degree of composure and serenity, against which a fee, weighed in the balance, would be found wanting. This is particularly the case, when the life or the reputation of the client is at stake.

The foregoing observations may also be applied to publick services done for the state, by assisting her in her councils, or by defending or prosecuting her interests. Even if no suitable return, as it sometimes happens, should be received from the state for such services; yet a mind, nurtured to the refined and enlarged exercise of the social passion, will find no trivial pleasure in the reflection that it has performed them, and that those, for whom they were performed, enjoy the advantages resulting from them. Virtue, in such an instance, will prove herself her own reward. A man, whose soul vibrates in unison with the benevolent affections, will always find within him an encouragement, and a compensation too, for discharging his duty—an encouragement and a compensation, of which ingratitude itself cannot deprive him.

I will not appeal to vanity, and ask, if any thing can be more flattering, than to *obtain* the praises and acclamations of others. But I will appeal to conscious rectitude, and ask, whether any thing can be more satisfactory, than to *deserve* their regard and esteem.

The possession of science is always attended with pleasure: but science, believe me, acquires an increased relish, when we have an opportunity of pouring it into the bosoms of others. We receive a redoubled satisfaction from the agreeable, though, perhaps, the flattering opinion, that we communicate entertainment and instruction; and from the opinion, better founded, that even weak attempts to communicate entertainment and instruction are received with reflected social emotions.

What can be more productive of happiness than even those wants, which are the foundations of so many blessings—love and friendship, generosity and reliance, kindness and gratitude? The gratifications even of sense lose their relish, if not heightened by the "spes mutui credulâ animi"—corresponding social emotions.

Our esteem of others, too, arising from the approbation of their conduct, is a most pleasing affection. The contemplation of a great and good character warms the heart, and invigorates the whole frame.

The wisest and most benign constitution of a rational and moral system is that, in which the degree of private affection, most useful to the individual, is, at the same time, consistent with the greatest interest of the system; and in which the degree of social affection, most useful to the system, is, at the same time, productive of the

greatest happiness to the individual. Thus it is in the system of society. In that system, he who acts on such principles, and is governed by such affections, as sever him from the common good and publick interest, works, in reality, towards his own misery: while he, on the other hand, who operates for the good of the whole, as is by nature and by nature's God appointed him, pursues, in truth, and at the same time, his own felicity.

Regulated by this standard, extensive, unerring, and sublime, self-love and social are the same.

To a state of society, then, we are invited from every quarter. It is natural; it is necessary; it is pleasing; it is profitable to us. The result of all is, that for a state of society we are designated by Him, who is all-wise and all-good.

Society may be distinguished into two kinds, natural and civil. This distinction has not been marked with the accuracy, which it well merits. Indeed some writers have given little or no attention to the latter kind; others have expressly denied it, and said, that there can be no civil society without civil government. But this is certainly not the case. A state of civil society must have existed, and such a state, in all our reasonings on this subject, must be supposed, before civil government could be regularly formed and established. Nay, 'tis for the security and improvement of such a state, that the adventitious one of civil government has been instituted. To civil society, indeed, without including in its description the idea of civil government, the name of *state* may be assigned, by way of excellence. It is in this sense that Cicero seems to use it, in the following

beautiful passage. "Nothing, which is exhibited on our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated,—jure sociati —are denominated states."[h]

How often has the end been sacrificed to the means! Government was instituted for the happiness of society: how often has the happiness of society been offered as a victim to the idol of government! But this is not agreeable to the true order of things: it is not consistent with the orthodox political creed. Let government—let even the constitution be, as they ought to be, the handmaids; let them not be, for they ought not to be, the mistresses of the state.

A state may be described—a complete body of free persons, united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person: it has its affairs and its interests: it has its rules; it has its obligations; and it has its rights. It may acquire property, distinct from that of its members: it may incur debts, to be discharged out of the publick stock, not out of the private fortunes of individuals: it may be bound by contracts, and for damages arising *quasi ex contractu*.

In order to constitute a state, it is indispensably necessary, that the wills and the power of all the members be united in such a manner, that they shall never act nor desire but one and the same thing, in whatever relates to the end, for which the society is established. It is from

[h] Somn. Scip. c. 3.

this union of wills and of strength, that the state or body politick results. The only rational and natural method, therefore, of constituting a civil society, is by the convention or consent of the members, who compose it. For by a civil society we properly understand, the voluntary union of persons in the same end, and in the same means requisite to obtain that end. This union is a benefit, not a sacrifice: civil is an addition to natural order.

This union may rationally be supposed to be formed in the following manner: if a number of people, who had hitherto lived independent of each other, wished to form a civil society, it would be necessary to enter into an engagement to associate together in one body, and to regulate, with one common consent, whatever regards their preservation, their security, their improvement, their happiness.

In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual. These engagements are obligatory, because they are mutual. The individuals who are not parties to them, are not members of the society.

Smaller societies may be formed within a state by a part of its members. These societies also are deemed to be moral persons; but not in a state of natural liberty: their actions are cognizable by the superiour power of the state, and are regulated by its laws. To these societies the name of corporations is generally appropriated, though somewhat improperly; for the term is strictly applicable to supreme as well as to inferiour bodies politick.

The foregoing account of the formation of civil society, which refers it to original engagements; and consequently resolves the duty of submission to the laws of the society, into the universal obligation of fidelity in the performance of promises, is warmly attacked by a sensible and ingenious writer.[1] He represents it, as founded on a supposition, false in fact; as insufficient, if it was true, for the purposes, for which it is produced; and as leading to dangerous consequences. He acknowledges, however, that, in the United States, transactions have happened, which bear the nearest resemblance to this political idea, of any, of which history has preserved the account or the memory. This subject has already received some; it will afterwards receive more attention and examination. At present, it is sufficient, and it is proper, to intimate to you the point of discussion; for it is a very important one in the science of government.

In civil society, previously to the institution of civil government, all men are equal. Of one blood all nations are made; from one source the whole human race has sprung.

When we say, that all men are equal; we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. In all these respects, there is, and it is fit for the great purposes of society that there should be, great inequality among men. In the moral and political as well as in the natural world, diversity forms an important part of beauty; and as of beauty, so of utility likewise. That social happiness, which arises from the friendly intercourse of good offices,

[1] 2. Paley 140.

could not be enjoyed, unless men were so framed and so disposed, as mutually to afford and to stand in need of service and assistance. Hence the necessity not only of great variety, but even of great inequality in the talents of men, bodily as well as mental. Society supposes mutual dependence: mutual dependence supposes mutual wants: all the social exercises and enjoyments may be reduced to two heads—that of giving, and that of receiving: but these imply different aptitudes to give and to receive.

Many are the degrees, many are the varieties of human genius, human dispositions, and human characters. One man has a turn for mechanicks; another, for architecture; one paints; a second makes poems: this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character, is not easy; is, perhaps, impossible. But though their efficient cause it may be difficult to explain; their final cause, that is, the intention of Providence in appointing them, we can see and admire. These varieties of taste and character induce different persons to choose different professions and employments in life: these varieties render mankind mutually beneficial to each other, and prevent too violent oppositions of interest in the same pursuit. Hence we enjoy a variety of conveniences; hence the numerous arts and sciences have been invented and improved; hence the sources of commerce and friendly intercourse between different nations have been opened; hence the circulation of truth has been quickened and promoted; hence the operations of social virtue have been multiplied and enlarged.

Heaven, forming each on other to depend,
Bids each on other for assistance call,
'Till one man's weakness grows the strength of all.
Wants, frailties, passions closer still ally
The common interest, or endear the tie:
To these we owe true friendship, love sincere,
Each home-felt joy, that life inherits here. j

How insipidly uniform would human life and manners be, without the beautiful variety of colours, reflected upon them by different tastes, different tempers, and different characters!

But however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect, in which all men in society, previous to civil government, are equal. With regard to all, there is an equality in rights and in obligations; there is that "jus æquum," that equal law, in which the Romans placed true freedom. The natural rights and duties of man belong equally to all. Each forms a part of that great system, whose greatest interest and happiness are intended by all the laws of God and nature. These laws prohibit the wisest and the most powerful from inflicting misery on the meanest and most ignorant; and from depriving them of their rights or just acquisitions. By these laws, rights, natural or acquired, are confirmed, in the same manner, to all; to the weak and artless, their small acquisitions, as well as to the strong and artful, their large ones. If much labour employed entitles the active to great possessions, the indolent have a right, equally sacred, to the little possessions, which they occupy and improve.

j Pope. Ess. Man. Ep. 2. v. 249.

As in civil society, previous to civil government, all men are equal; so, in the same state, all men are free. In such a state, no one can claim, in preference to another, superiour right: in the same state, no one can claim over another superiour authority.

Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those, for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided more publick interests do not demand his labours. This right is natural liberty. Every man has a sense of this right. Every man has a sense of the impropriety of restraining or interrupting it. Those who judge wisely, will use this liberty virtuously and honourably: those, who are less wise, will employ it in meaner pursuits: others, again, may, perhaps, indulge it in what may be justly censured as vicious and dishonourable. Yet, with regard even to these last, while they are not injurious to others; and while no human institution has placed them under the control of magistrates or laws, the sense of liberty is so strong, and its loss is so deeply resented, that, upon the whole, more unhappiness would result from depriving them of their liberty on account of their imprudence, than could be reasonably apprehended from the imprudent use of their liberty.

The right of natural liberty is suggested to us not only by the selfish parts of our constitution, but by our generous affections; and especially by our moral sense, which intimates to us, that in our voluntary actions consist our dignity and perfection.

The laws of nature are the measure and the rule; they ascertain the limits and the extent of natural liberty.

In society, when the sentiments of the members are not unanimous, the voice of the majority must be deemed the will of the whole. That the majority, by any vote, should bind not only themselves, but those also who dissent from that vote, seems, at first, to be inconsistent with the well known rules—that all men are naturally equal; and that all men are naturally free. From these rules, it may be alleged, that no one can be bound by the act of another, without his own consent. But it is to be remembered, that society is constituted for a certain purpose; and that each member of it consents that this purpose shall be carried on; and, consequently, that every thing necessary for carrying it on shall be done. Now a number of persons can jointly do business only in three ways—by the decision of the whole, by the decision of the majority, or by the decision of the minority. The first case is not here supposed, nor is there occasion to make a question concerning it. The only remaining question, then, which can be proposed, is, which is most reasonable and equitable—that the minority should bind the majority—or that the majority should bind the minority? The latter, certainly. It is most reasonable; because it is not so probable, that a greater number, as that a smaller number, concurring in judgment, should be mistaken. It is most equitable;

because the greater number are presumed to have an interest in the society proportioned to that number. Besides; though, in the case supposed, the minority are bound without their *immediate* consent; they are bound by their consent originally given to the establishment of the society, for the purposes which it was intended to accomplish. For it has been already observed, that those, who enter not into the original engagement forming the society, are not to be considered as members: all the members, therefore, must have originally given their consent.

The rule, which we have mentioned, may be altered and modified by positive institution. In some cases, the consent of a number larger than a mere majority: in others, even unanimity may be required.

This is the proper place for considering a question of very considerable importance in civil society, and concerning which there has been much diversity in the sentiments of writers, and in the laws and practice of states: has a state a right to prohibit the emigration of its members? may a citizen dissolve the connexion between him and his country?

On the principles of the compact of association, which I have already stated, there seems to be but little doubt that one article of it may be, that each individual binds himself indissolubly to the society, while the society performs, on its part, the stipulated conditions. This engagement each individual may make for himself:[k] but

[k] Connecticut was originally settled by emigrants from the neighbourhood of Boston. They applied to the general court of Massa-

can he make it for his children and his posterity? must they be and continue bound by the act of their father and ancestor?

The notion of natural, perpetual, and unalienable allegiance from the citizen to the society, or to the head of the society, of which he was born a member, has, by some writers and in some countries, been carried very far indeed: and their practice has been equally rigorous with their principles. The well known maxim, which the writers upon the law of England have adopted and applied to this case is,[1] "Nemo potest exuere patriam." It is not, therefore, as is holden by that law, in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown. Hence it has been adjudged, that a cartel for the exchange or ransom of prisoners of war cannot extend to the case of a subject born, though clothed with a commission from the party to the cartel. The reason assigned is, that by the laws of all nations, subjects taken in arms against their lawful prince are not considered as prisoners of war, but as rebels; and are liable to the punishments ordinarily inflicted on rebels.[m] This doctrine was, so late as the

chusetts for permission to go in quest of new adventures: and could not be satisfied, until they had obtained the leave of the court. For it was the general sense, as we are assured, that the inhabitants were all mutually bound to one another by the oath of a freeman, as well as the original compact; so as not to be at liberty to separate without the consent of the whole. Chal. 286.

[1] Fost. 184. [m] Id. 60.

year one thousand seven hundred and forty seven, applied to the case of a native of Great Britain, who had received his education in France from his early infancy; and who had spent his riper years in a profitable employment in that kingdom, where all his hopes were centred. [n]

The reasons in favour of the position, that a citizen cannot dissolve the political connexion between him and his country, may be stated in the following manner. Every citizen, as soon as he is born, is under the protection of the state, and is entitled to all the advantages arising from that protection: he, therefore, owes obedience to that power, from which the protection, which he enjoys, is derived. But while he continues in infancy and nonage, he cannot perform the duties of obedience. The performance of them must be respited, till he arrive at the years of discretion and maturity. When he arrives at those years, he owes obedience, not only for the protection, which he then enjoys, but also for that, which, from his birth, he has enjoyed. Obedience now becomes a duty founded upon principles of gratitude, as well as upon principles of interest: it becomes a debt, which nothing but the performance of the duties of citizenship, during a whole life, will discharge. [o]

But, notwithstanding this train of thought and reasoning, there are certainly cases, in which a citizen has an unquestionable right to renounce his country, and go in quest of a settlement in some other part of the world. One of these cases is, when, in his own country, he cannot procure a subsistence. Another is, when the society neglects to fulfil its obligations to the citizen.

[n] Fost. 59. [o] 2. P. Wms. 123. 124.

A third is, when the society would establish laws, on things, to which the original social compact cannot oblige the citizen to submit. [p]

In answer to the inferences drawn from principles of gratitude, it may be observed, that every man being born free, a native citizen, when he arrives at the age of discretion, may examine whether it be convenient for him to join in the society, for which he was destined by his birth. If, on examination, he finds, that it will be more advantageous to him to remove into another country, he has a right to go, making to that which he leaves a proper return for what it has done in his favour, and preserving for it, as far as it shall be consistent with the engagements, which his new situation and connexions may require, the sentiments of respect and attachment.

The sentiments of Mr. Locke on this subject go much further. "'Tis plain," says he, [q] "by the law of right reason, that a child is born a subject of no country or government. He is under his father's tuition and authority, till he comes to the age of discretion; and then he is a freeman, at liberty what government he will put himself under; what body politick he will unite himself to."

"O glorious regulations!" says Cicero, [r] "originally established for us by our ancestors of Roman name; that no one of us should be obliged to belong to more than one society, since a dissimilitude of societies must

[p] Vat. 96. b. 1. s. 223—225. [q] On Civ. Gov. s. 118

[r] Pro. Balb. c. 13.

produce a proportioned variety of laws; that no one, contrary to his inclination, should be deprived of his right of citizenship; and that no one, contrary to his inclinations, should be obliged to continue in that relation. The power of retaining and of renouncing our rights of citizenship, is the most stable foundation of our liberties."

In the digest of the Roman law,[s] it is laid down as a rule, that every one is at liberty to choose the state, of which he wishes to be a member.

Indeed, excepting in some very particular cases, every one ought to be at liberty to leave the state. This general liberty is not only just, but may be productive of much generous emulation among states, and of extensive advantages to their citizens. Those states, which manage their affairs best, will offer the strongest inducements to their own citizens to remain, and to others to incorporate among them. On the other hand, it is both inhuman and unjust to convert the state into a prison for its citizens, by preventing them from leaving it on a prospect of advantage to themselves. True it is, that they ought to make compensation for any advantages, which they have derived from the state at its expense: but equally true it is, that this compensation is generally made, by their having contributed annually, during their past residence, towards the publick revenue, by paying taxes on property, as all men, even minors, do; and by consuming goods, on which imposts or duties have been levied.

[s] Dig. l. 49. t. 15.

Emigration may arise from various causes. It may be occasioned by the population of a country. In this case, great numbers may be constantly leaving the state, and yet the state may be increasing in population. It has been suggested by some writers, that the right of exposing children has been one cause of the populousness of China. Surely the prospect that they will be comfortably provided for, if not in their own, yet in another country, must be a much more powerful, as well as more humane incentive to marriages.

Insecurity, hardships, oppression may be the causes of emigration. A nation whose inhabitants are in a predicament so disagreeable, may be in declining circumstances; but those circumstances, indicating a decline, are not the effects of emigration; they are the effects of the evils and calamities which occasion it. Two things, which are commonly considered as cause and effect, are often no more than two collateral effects of the same cause.

Independently, therefore, of the question of right, there can be but few cases, in which emigration could be prohibited on the sound principles of policy. Emigration, it is true, may be a symptom of languor and decay; but it may also be an evidence and a consequence of the overflowing vigour and prosperity of the state.

Permit me to suggest a still further reason—to me it appears a strong one—in favour of unrestrained emigration. In a free state, the consent of every citizen to its institution and government ought to be evinced either by express declarations, or by the strongest and justest

presumptions. When a state is formed, the residence of a citizen is presumed a sufficient evidence of his assent and acquiescence in its institutions: to reside in any country is universally deemed a submission to its authority. But that these presumptions may be fairly drawn, we must be understood as speaking of a state, from which the citizens have liberty to depart with their effects at pleasure. Where this liberty is not enjoyed, the considerations of family, of property, and many other considerations that are without a name, may detain a man, much against his inclination, in a country, in which he finds himself trammelled. In such case, his residence is no reasonable evidence of his consent to the formation, the constitution, the government, or the laws of the state.

Upon the whole it appears, that the right of emigration is a *right*, advantageous to the citizen, and generally useful even to the state. It may, however, in the fundamental laws, be reduced to a certainty. The citizens of Neufchatel in Switzerland may quit the country, and carry off their effects, in whatever manner they please, without paying any duties.[t] By the constitution of Pennsylvania,[u] it is declared "that emigration from the state shall not be prohibited."

These remarks on the rights and principles of emigration, prepare the way for remarks, more important, on the principles and rights of colonization, which will form the subject of inquiry in a future part of our lectures.

[t] Vat. 96. b. 1. s. 225. [u] Art. 9. s. 25.

CHAPTER VIII.

OF MAN, AS A MEMBER OF A CONFEDERATION.

A NUMBER of states or societies may associate or confederate together for their mutual security and advantage. In some respects, such confederacies are to be considered as forming only one nation: in other respects, they are to be considered as still retaining their separate political capacities, characters, rights, and powers. Associations of this kind have made their appearance but seldom on the great theatre of human affairs; and when they have appeared, the part they have acted has generally been but a short one; and even that short part has, in most instances, been defaced, or mutilated, or rendered obscure by the effect of all-corroding time. The appearance, however, of personages, so peculiarly interesting to the United States, well deserves to be marked, to be traced, to be distinguished, with the most sedulous precision and exactness.

The first association of this kind, of which we have any information from history, is that of the Amphyctionick Council, so called from Amphyction, by whom it was instituted. In the time of this wise and patriotick prince, the condition of Greece demanded his most serious and deep reflection. That country was divided into a great number of small independent sovereignties. That division was likely to occasion controversies, and produce ruinous intestine wars. Weakness and confusion, the inseparable concomitants of such wars, might invite the attacks of the barbarous nations, by whom Greece was surrounded. Her destruction, total and irretrievable, might prove the necessary consequence.

To prevent calamities, so probable and so great, Amphyction meditated and formed the plan of uniting all the different states of Greece in one common bond, as well as in one common interest; that, availing themselves of the advantages and strength acquired by this union, they might labour together in maintaining their internal peace and security, and in rendering themselves respectable, and, if necessary, formidable to the neighbouring nations. With this view, and on these principles, he formed a league among twelve Grecian cities, whose deputies were to meet twice a year at Thermopylæ, where Amphyction reigned.[a] Difference of times and circumstances produced many successive alterations in this assembly; but the general intention and invariable object of all its modellers and directers was, to form a complete representation of all Greece.[b]

[a] 2. Gog. Or. Laws. 26. [b] Lel. L. P. Prel. 43.

Each city sent two deputies; and had, of consequence, two votes in their deliberations, without distinction or preeminence.

We should consider the Council of the Amphyctions as the Congress of the United States of Greece. The delegates, who composed that august assembly, represented the body of the nation; and were invested with full power to deliberate and resolve upon whatever appeared to them to be most conducive to the publick prosperity.[c] Besides those laws, by which each particular city was governed, others were enacted by the Council of Amphyctions, of general force and obligation on all. Those were called Amphyctionick laws. All contests between the Grecian states and cities came under the particular cognizance of the Amphyctions. To their tribunal, an appeal also lay in all private controversies.[d] To the same tribunal, individuals were amenable for their publick crimes.[e] Their authority extended to the raising of forces, and to compel the obstinate to submit to the execution of their decrees. The three religious wars, undertaken by the order of the Amphyctions, are striking instances of the extent of their power.[f]

Among the Grecians, it was esteemed a high honour to have a right to send delegates to this kind of states-general. The least mark of infidelity to their country was sufficient to prevent their admission, or to procure their expulsion. The Lacedemonians, however impor-

[c] 2. Gog. Or. Laws. 27. [d] Lel. L. P. Prel. 39. 53.

[e] Lel. Dem. Int. to oration de corona.

[f] 2. Gog. Or. Laws. 27.

tant, and the Phocians were, for some time, excluded; and could not obtain a readmission, till, by unequivocal proofs of service and attachment to the publick, they had made reparation for the fault, which they had committed.

The effects, produced by the Council of the Amphyctions, fully answered the most sanguine expectations of the prince, by whom it was instituted. From the moment of its establishment, the interests of their country became the common concern of all the people of Greece. The different states, of which the union was composed, formed only one and the same republick: and this union it was, which made the Greeks so formidable afterwards to the barbarians.[s] To the Amphyctions we may ascribe the salvation of Greece from the invasion of Xerxes. It was by means of this association, that she performed such wonderful actions, and supported, for so long a time, the character of the pride of nations.

Amphyction ought to be esteemed one of the greatest men, that Greece ever produced; and the establishment of the Council of the Amphyctions should be admired, as a great master-piece in human politicks.

While the generous principles, on which the Council of the Amphyctions was formed, continued to preserve their due vigour, that illustrious body was respectable, august, and powerful. But when Greece herself began to degenerate, her representative body was contaminated with the general corruption. The decline of this council we may date particularly from the time, when Philip

[s] 2. Gog. Or. Laws. 28.

of Macedon, artful and intriguing, practised on its venal members by bribes, and succeeded in having his kingdom annexed to the Hellenick Body. It continued, however, for ages after the destruction of Grecian liberty, to assemble, and to exercise some remains of its authority.[h]

The next confederacy, which claims our attention, is that of the Lycians. In this republick, the just rights of suffrage were observed with great accuracy. It was an association of twenty three towns. These were arranged into three classes, in proportion to their strength. In the first class, six states were included. The numbers of which the second and third classes were composed, are uncertain. Every city had its own magistrates and government, and managed its own internal affairs. But all, uniting together, formed only one common republick, and had one common council. In that council, they deliberated and resolved concerning war, concerning peace, concerning alliances; in a word, concerning the general interests and welfare of the Lycians. The towns of the first class had three votes; the towns of the second class had two votes; and the towns of the third class had one vote, in the common council. In the same proportion, they contributed to the publick expenses, and appointed the publick magistrates of the union.

This republick was celebrated for its moderation and justice. Respected and unimpaired, it continued till the Romans, by their extending conquests, overpowered every thing in Asia.

[h] Lel. L. P. Prel. 56. 57.

Concerning the Lycians, one observation is made, which merits our particular notice. They observed customs more than written laws. [i]

"Was I to give," says the celebrated Montesquieu, [j] "the model of an excellent confederate republick, I would select that of Lycia." The happy experience, however, of the United States, has evinced, that, even upon that model, immense improvements have been made.

The Achæan League comes now in review before us. The cities composing it retained, like those of Lycia, the government of their interiour police, and appointed their own magistrates and publick officers. The senate, in which they were represented, had the sole and exclusive right of declaring war and making peace; of receiving and sending ambassadours; of entering into treaties, and forming alliances. It appointed a chief magistrate, called a pretor, who commanded their armies, and who, assisted by a council of ten of the senators, not only administered the government during the recess of the senate; but, when the senate was assembled, had also a large share in its deliberations. At first, there were two pretors; but experience taught them to prefer one.

In Achaia, all the cities had the same money, the same weights and measures, the same customs and laws. The popular government, we are told, was not so tempestuous in the cities of Achaia, as in some of the other cities of Greece; because, in Achaia, it was tempered by the authority and laws of the confederacy. Indeed it

[i] 2. Ub. Em. 320. 323. [j] Sp. Laws. b. 9. c. 3.

is unquestionable, that, in this confederacy, there was much more moderation and justice, than was to be found in any of the cities exercising singly all the prerogatives of sovereignty.

When Lacedæmon was admitted into the Achæan League; she was obliged to abolish the institutions of Lycurgus, and to adopt the laws of the Achæans. But Lacedæmon had been long a member of the Amphyctionick Council; and, during all the time, she had been left in the full possession of her own government and laws. This circumstance discloses a very important difference between those two confederate systems. [k]

The Ætolian League was similar to that of the Achæans; and therefore it is unnecessary to make particular observations concerning it. [l]

The Germanick Body has been generally considered as a confederate state. From the feudal system, which has itself many of the important features of a confederacy, the federal system, which constitutes the empire of Germany, has grown. Its powers are vested in a diet, representing the component members of the confederacy; in the emperour, who is the executive magistrate, with a negative on the decrees of the diet; and in the imperial chamber and aulick council, two tribunals possessed of supreme jurisdiction in controversies, which concern the empire, or happen among its members.

[k] 1. Pub. 114. 2. Ub. Em. 240. 243.

[l] 2. Ub. Em. 257.

The diet possesses the power of legislation for the empire, of making peace and war, contracting alliances, assessing quotas of troops and money, constructing fortresses, regulating coin, admitting new members, and subjecting disobedient members to the ban of the empire; by which the party is degraded from his sovereign rights, and his possessions are forfeited. The members of the confederacy are expressly restricted from entering into compacts prejudicial to the empire; (from imposing tolls and duties on their mutual intercourse,) without the consent of the emperour and diet; from altering the value of money; from doing injustice to one another; and from affording assistance or retreat to the disturbers of the publick peace. The ban is denounced against such as shall violate any of these restrictions.

The members of the diet, as such, are subject, in all cases, to be judged by the emperour and diet; and, in their private capacities, by the aulick council and imperial chamber.

The prerogatives of the emperour are numerous. The most important of them are—his exclusive right to make propositions to the diet, to negative its resolutions, to name ambassadours, to confer dignities and titles, to fill vacant electorates, to found universities, to grant privileges not injurious to the states of the empire, to receive and apply the publick revenues, and generally to watch over the publick safety. In certain cases, the electors form a council to him. In the character of emperour, he possesses no territory within the empire; and receives no revenue for his support.

The fundamental principle, on which this confederacy rests, is—that the empire is a community of sove-

reigns—that the diet is a representation of sovereigns—and that the laws are addressed to sovereigns. [m] The princes and free states of Germany may treat with foreign powers. [n]

The Swiss Cantons are frequently mentioned as forming a confederacy; but they are improperly mentioned in that character. They are no more than states connected together by a close and perpetual alliance. They have no common treasury; they have no national troops, even in war; they have no common coin; they have no common tribunal; they have no common characteristick of sovereignty.

When a dispute happens among the cantons, there is a provision, that the parties to that dispute shall each choose four judges out of the neutral cantons, who, in case of disagreement, choose an umpire. This tribunal, under an oath of impartiality, pronounces definitive sentence. This sentence all the cantons are bound to enforce. [o]

The United Netherlands are generally represented as a confederacy. If the term can, with propriety, be applied to them; they are a confederacy of republicks, or rather of aristocracies, of a very remarkable texture.

The union is composed of seven coequal and sovereign states or provinces; [p] and each state or province is

[m] 1. Pub. 119. 120. [n] Vat. 171. [o] 1. Pub. 123.

[p] We may exceed the United Provinces by having, not many sovereignties *in* one commonwealth, but many commonwealths under one sovereignty. Milt. 370.

a composition of equal and independent cities. In all important cases, not only the states, but the cities, must be unanimous.

The sovereignty of the union is represented by the states-general, consisting of deputies appointed by the provinces. Some hold their seats for life; some, for six years; some, for three years; some, for one year; some, during pleasure.

The states-general have authority to enter into treaties and alliances; to make war and peace; to raise armies and equip fleets; to ascertain quotas, and demand contributions. In all these cases, however, unanimity and the sanction of their constituents are requisite. They have authority to appoint and receive ambassadours; to execute treaties and alliances already formed; to provide for the collection of duties on imports and exports; to regulate the mint, with a saving to the provincial rights; to govern, as sovereigns, the dependent territories.

The particular states or provinces are restrained, unless with the general consent, from entering into foreign treaties; from establishing imposts injurious to others; and from charging higher duties upon their neighbours than upon their own citizens.

A council of state; a chamber of accounts; and five colleges of admiralty, aid and fortify the federal administration.

The executive magistrate of the union is the stadtholder, who is now an hereditary prince. As stadthold-

er, he is invested with very considerable prerogatives. In his civil capacity, he has power to settle disputes between the provinces; to assist at the deliberations of the states-general; to give audiences to foreign ambassadours; and to keep agents, for his particular affairs, at foreign courts. In his military capacity, he commands the federal troops; provides for garrisons; regulates military affairs; disposes of military appointments, and of the government of fortified towns. In his marine capacity, he is admiral, and superintends every thing relative to naval affairs; presides in the admiralties in person or by proxy; appoints naval officers; and establishes councils of war, whose sentences are not executed till he approve them. He is stadtholder in the several provinces, as well as in the union; and, in this provincial character, he has the appointment of town magistrates; executes provincial decrees; and presides, when he pleases, in the provincial tribunals. Throughout all, he has the power of pardon.[q]

After the independence of the United Netherlands was recognised by Spain, the individual states began to pay very little regard to the decrees of the states-general: even particular towns and lordships seemed desirous of maintaining entire independence on the states of the provinces, within which they were situated. The Dutch government, which had greatly relaxed, and was even threatened with dissolution, recovered its tone through the dangers, to which the United Provinces were exposed by the war of thirty years, which was terminated by the peace of Westphalia. Since that time, dissensions among the Dutch have prevailed, or have been compo-

[q] 1. Pub. 125. 126.

sed, according as they have dreaded or trusted their ambitious neighbours.[r]

In the Saxon Heptarchy, a confederacy certainly existed; though, perhaps, a confederacy weak, defective, and interrupted; and from all the confederated states a wittenagemote was frequently called.[s] This general superintending body was sometimes called a *panangli-cum*.

Among the ancient Germans, the genius of confederacy pervaded the whole structure of society. They sojourned in huts, which served them as strong holds, to which they carried their property in time of danger. These strong holds or *pagi*, as the Greeks and Romans called them, were the natural resort of the tribes in their neighbourhood, and seem to have been the embryos of the little states, with which ancient Europe so much abounded. A point of union being thus formed among a few tribes, it was natural that the warriours should frequently assemble at that point. In those assemblies, a king, or common leader in war, and an executive magistrate in peace, was chosen.[t] "Eliguntur," says Tacitus,[u] "in iisdem consiliis principes, qui jura per pagos vicosque reddunt."

Though, in general, each pagus acknowledged no superiour, yet particular circumstances of society induced numbers of them to confederate; and, when wars happened, a common leader of the confederacy was chosen of course. When a confederacy of neighbouring pagi

[r] 2. Anal. Rev. 337.

[s] Mil. 52.

[t] 3. Edin. Phil. Trans. 18.

[u] De mor. Germ. c. 12.

had subsisted for a considerable time, a sentiment of national union and of national character began, at last, to appear and operate. The common leader, occasionally chosen for a war, was so often elected, that he became a king, like the chief of a pagus; that he was a *princeps regionis*, with several *principes pagorum* in such a subordination under him, as the chiefs of *vici*, or of primary tribes, were originally held under the chiefs of the pagi.

These combined associates became, again, the members of a greater and less consolidated confederacy. According to Tacitus, the Suevi, one of the greatest communities of Germany, were not comprehended in a single people, but were divided into several nations, all bearing distinct names, though they were all included under the common appellation of Suevi. The Semnones, a single nation, though, indeed, the most noble and the most ancient nation, comprehended under this great confederacy, inhabited no fewer than a hundred pagi. Over the largest portion of Germany the confederacy of the Suevi extended. [v] Thus the Semnones, though but a single member of the great confederacy of the Suevi, were themselves, considered with regard to the pagi which they inhabited, a very considerable national confederacy.

Of a confederacy, whether supreme or subordinate, every member possessed, within itself, legislative, executive, and judicial powers, similar, but inferiour to those exercised by the confederacy itself. In this way the

[v] Tac. de mor. Germ. c. 38. 39.

form of society was nearly indestructible.[w] The bonds of association were in just, though inverse, number and proportion to the extent and greatness of the parts associated.

Let us conclude this general view of confederacies with an account of one, which was established, where we should little expect to find it, in Iceland. That obscure and sequestered region—but what place or what people are there, from whence instruction may not be drawn—was peopled by a series of colonies from Norway. These colonists relinquished their country, when it was conquered by Harold with the beautiful hair, in the year eight hundred and seventy eight. In their new settlements, they formed small communities with elective chiefs. These, by degrees, combined together, and held assemblies, under a common leader, in each of the four great provinces, into which the ridges of Mount Hecla divide the island. At last, these four provinces likewise confederated, and formed, in the year nine hundred and twenty eight, a republick, under one chief magistrate.

The whole country was arranged into regular divisions, called provinces, hundreds, and reeps. The magistrates held their offices for life. Diets were held for the districts; and an alting, or great annual assembly, was held for the nation. In that assembly, besides the arrangement of political matters, appeals were received from the provincial courts, and rejudged, in its presence, and under its inspection, by the former judges. The duty of the lagman, or chief of the nation, was to carry into execution what the alting ordered and decreed.

[w] 3. Edin. Phil. Trans. 22.

There was a succession of thirty eight lagmans, which continued till the year one thousand two hundred and sixty two, when the republick was destroyed by the Danes.

This account is taken from the Icelandick historian, Arngrimus Jonas, a native of the island, and a person, who appears to have had abundance of materials for his work.[x]

On a subject of such magnitude, not only that which has been done, but also that which has been proposed to be done, well deserves attention and examination. I allude to the grand plan of a general confederacy in Europe, formed by the immense genius of Henry the Fourth of France; in which he received most essential assistance from the genius, no less penetrating and active, of Elizabeth of England.

It is very remarkable, that, by several writers, and even by some very profound ones, this very enlarged plan of government is considered as nothing better than a mere visionary project; and doubts are proposed whether it could ever engage the serious contemplation of Henry the Great. To me, I confess, the matter appears in a very different light; and I feel myself justified and supported in directing your close and earnest attention to it, when I consider the fact as authenticated by the testimony of Sully, Henry's faithful and confidential minister, and the plan itself as occupying, for a series of years, the unremitted application of Henry and Elizabeth; who were distinguished by their wisdom, as well

[x] 3. Edin. Phil. Trans. 23.

as by their enterprise; and who knew, if ever princes knew, how to draw the important line between what is extravagant and what is great.

An investigation of this sublime system, from its commencement through the various and successive stages of its progress and preparation, must be instructive to all: to Americans, it must be interesting as well as instructive.

Sully enters upon his account of it with expressing some sagacious apprehension [illegible], in fact, has since been the case—it would be [illegible] as one of those darling chimeras, or idle po[illegible]ulations, in which a mind susceptible of singul[illegible] incommon conceptions, is sometimes easily engaged. He confesses, that at the first time the king sugg[illegible] to him the idea of a political system, by which all Europe might be managed and governed as a single family, he received the suggestion, supposing that Henry [illegible] by it nothing more than to amuse himself with a [illegible] speculation, or, at most, to show, that his [illegible]mplations on political subjects were more profound [illegible] more extensive than those of others.

How modest is conscious merit! Henry often afterwards owned to his confidential friend, that he had long concealed even from him what he meditated upon this great subject, from a principle of shame, lest he should disclose designs, which might appear ridiculous or impracticable.

Inattentive to this great design, when it was first suggested, the cold and cautious Sully was averse to it when

the suggestion was renewed. An endless series of difficulties and obstructions presented itself to his circumspect mind. The extent of a design, which supposed a union of all the states in Europe; the concatenation of events, almost infinite, that would be necessary for its accomplishment; the immense expenses, which, if it could be accomplished, would thereby be rolled upon France at a crisis, when she was scarcely able to supply her own necessities—all these considerations induced him to consider the scheme as a vain one, and even to suspect, that, in it, there was something illusory. The disposition of the princes of Europe to become jealous of France, when once, they have assisted them to dissipate their fears from the overgrown power of the house of Austria, appeared in itself, an insurmountable obstacle. His own sentiments he endeavoured to infuse into the mind of the king, with an honest desire to undeceive him, as he thought. Henry begged him to consider the plan in its several parts, and not to pass an indiscriminate sentence of condemnation upon the whole. This solicitation, so reasonable and so unassuming, it was impossible to refuse. The result of Sully's consideration was what Henry expected it would be—the conversion of the minister to the opinions of the prince. After having seen all the parts of the fabrick from their proper points of view, after having made the necessary examinations and the necessary calculations, he found himself engaged and confirmed in the sentiment, that the plan was just in its intention, and that it would be practicable in the execution, and glorious in its consequences.

Great minds frequently unite, without intercommunication, upon the same great object. This exalted sys-

tem presented itself to the penetration and magnanimity of Elizabeth, before it had occurred to the expansive comprehension of Henry. Indeed it appears doubtful, whether he was not indebted to her for the first hint of the design. But between two such minds, there was no mean jealousy about the right or the merit of the prior discovery. The family of Sully is still possessed of a letter written by Henry, evidently to Elizabeth, though her name does not appear either in the superscription or in the letter itself. It is addressed to "her who merits immortal praise." In it, Henry speaks of a certain object, which he calls "the most excellent and rare enterprise that the human mind ever conceived"—"a thought rather divine than human." He mentions, with rapture, "a discourse so well connected and demonstrative of what would be necessary for the government of empires and kingdoms," and these "conceptions and resolutions," from which nothing less could be hoped, than "most remarkable issues both of honour and glory." These expressions can point to no other person than Elizabeth—to no other object than that, in the investigation of which we are now engaged.

It is well known that Henry and Elizabeth were anxious to have a personal interview; and that, in the year 1601, the latter came to Dover and the former to Calais for this purpose. The ceremonials, established among princes, prevented the satisfaction of a conference; but those communications, which Henry could not make in person, he transmitted by the faithful Sully. This minister found that she was deeply engaged in the means, by which the great design might be happily executed; and that, notwithstanding the difficulties, which, in some points, she apprehended, she did not appear at

all to doubt of success. This she chiefly expected for a reason, of the solidity and justness of which, Sully declares that he was afterwards well convinced. It was, that as the plan was, in truth, contrary only to the designs of some princes, whose ambitious views were sufficiently known to all Europe, the obstacles interposed by those princes, instead of retarding, would promote the design; since they would place its necessity in a more striking point of view.

"A very great number, says Sully, of the articles, conditions, and different dispositions is due to this queen; and sufficiently evince, that, in respect of wisdom, penetration, and all the other perfections of the mind, she was not inferiour to any king, the most truly deserving of that title."

The death of this great princess gave such a violent shock to the whole plan, that Henry and his minister were almost induced to abandon their fondest hopes. The successour to the throne was the successour neither to the virtues nor to the talents of Elizabeth; and Henry had too much penetration to expect that assistance, which James had too much pusillanimity to give. After some time, however, favourable circumstances occurred again, which induced him to reassume the plan, and to prepare, with renewed vigour, for its execution. Of its execution, he was on the very eve, when the fatal poignard of Ravaillac interrupted it.

The leading object in the great design was to reduce, within reasonable bounds, the formidable power of the house of Austria. With this view, it was proposed to devest that house of its possessions in Germany, Italy,

and the Low Countries; and to confine it to the kingdom of Spain, bounded by the ocean, the Mediterranean, and the Pyrenean mountains. That it might, however, be equally powerful with the other sovereigns in Europe, it was intended to allot to it Sardinia, Majorca, Minorca, the Canaries, the Azores, and its possessions in Asia, Africa, and America.

"If there be any where," says Vattel,[y] "a state restless and mischievous, always ready to injure others, to traverse their designs, and to foment domestick troubles within them; it is not to be doubted, that all have a right to join in order to repress it, and deprive it of the power to molest them in future. The conduct of Philip the second of Spain was adapted to unite all Europe against him; and it was from just reasons that Henry the Great formed the design of humbling a power, formidable by its forces, and pernicious by its maxims."

Between Henry and Elizabeth, it was a settled point, that neither of them should, by the different dismemberments proposed to be made, receive any thing, except the glory of distributing them with equity and impartiality. Henry even sometimes said, with equal moderation and good sense, that were the meditated dispositions once firmly established, he would have consented that the extent of France should have been determined by a majority of suffrages. With regard to England, the conduct of Elizabeth was probably influenced by an observation, which she made, that the Britannick isles, in all the different states, through which they passed, and among all the variations of their laws and policy, had

[y] B. 2. s. 53.

never experienced great misfortunes, but when their sovereigns had interfered in matters beyond the sphere of their little continent. It seems, indeed, as if they were concentred in it, even by nature; and their happiness appears to depend entirely on themselves, provided they aim only to maintain peace in the three nations subject to them, by governing each according to its own laws and customs.

The ultimate design of the great plan was, to divide Europe equally among a certain number of powers, in such a manner, that no one might have reason for either envy or fear, from the power or possessions of the others. The number of states were reduced to fifteen. They were of three different kinds; hereditary monarchies; elective monarchies; republicks. The hereditary monarchies were six—France, Spain, Britain, Denmark, Sweden, Lombardy. The elective monarchies were five—the Empire, the Papacy, Poland, Hungary, Bohemia. The republicks were four—the Venetian, the Italian, the Helvetick, the Belgick.

There was to have been a general council, representing all the states of Europe. The establishment of this would have been the happiest invention that could have been conceived for preventing those innovations, and for applying a remedy to those inconveniences or defects, which time often introduces or discovers in the wisest and the most useful institutions. The model of this general council of Europe was formed on that of the ancient Amphyctions of Greece (a delineation of which I have already laid before you) with such alterations only as rendered it suitable to the alterations of customs, climate, and policy. It was to consist of a certain number

of delegates from all the governments of the Christian Republick, who were to be constantly assembled as a senate. This body was to discuss the different interests, decide the controversies, and determine all the civil, political, and religious affairs of Europe, whether within itself or with its neighbours. The senate was to consist of four delegates from each of the following powers—the Emperour, the Pope, the kings of France, Spain, England, Denmark, Sweden, Lombardy, Poland, and the republick of Venice; and of two only from the other republicks and inferiour powers. All together would have composed a senate of about sixty six persons. They were to be chosen every three years. With regard to the place of meeting, it was undetermined whether it would be better for the council to be fixed or ambulatory; united in one, or divided into three. If it were divided into three, each containing twenty two magistrates, then each of them must have been fixed in such a centre as should appear to be most commodious. If it were judged more expedient not to divide the assembly, whether fixed or ambulatory, it must have been nearly in the centre of Europe.

Besides this general council, it would have been proper to have constituted subordinate councils: but whatever the number or form of those subordinate councils had been, it would have been absolutely necessary that an appeal should have lain from them to the general council, whose decisions, when considered as proceeding from the united authority of all the sovereigns, pronounced in a manner equally free and absolute; must have been regarded as so many final and irrevocable decrees.

A particular account is given by Sully of the measures taken to secure the success of this great and glorious design.

Henry was indefatigable in his negotiations in the different courts of Europe, particularly in the United Provinces, and in the circles of Germany. The council of the states-general were very soon unanimous in their determinations. The states-general were, in a short time, followed by the landgrave of Hesse, and the prince of Anhalt, to whom, as well as to the prince of Orange, the confederacy was obliged for being increased by the duke of Savoy; by all of the reformed religion in Hungary, Bohemia, and lower Austria; by many princes and towns in Germany; and by a great proportion of the Swiss Cantons. But a discovery either of the true motives, or of the full extent of the design, was cautiously avoided. It was, at first, concealed from all, without exception; and it was afterwards revealed, only to a few persons of approved discretion; and even of those, only to such as were absolutely to engage others to join the confederacy.

The king, on his side, had actually set on foot two good and well furnished armies; one of which he was to have commanded in person. It was to have consisted of twenty thousand foot, all native French, eight thousand Swiss, four thousand Lansquenets or Walloons, five thousand horse, and twenty cannons. The second was to have been commanded by Lesdiguieres, consisting of ten thousand foot, one thousand horse, and ten cannons; besides a flying camp of four thousand foot, six hundred horse, and ten cannons; and a reserve of two thousand foot to garrison places, where they might be necessary. Magazines were collected and deposited in

proper places, for facilitating the execution of the enterprise: and, with the same view, manifestoes were composed with the greatest care. In them, a spirit of justice, of good policy, of honesty, of disinterestedness, and of inviolable faith was universally apparent.

It is impossible to dismiss a design, so interesting to humanity, without indulging a few observations concerning its nature, and its probable effects. That it was bold and magnificent, it will be unanimously agreed: but was it nothing more? was it not presumptuous and extravagant? We have seen that, as such, it was, at first, considered by Sully. As such, even the least difficult and most unimportant parts of it were considered by the other counsellors of France: for it was only on the least difficult and most unimportant parts, that he could venture to consult them. "Could it be imagined," says Sully, "that Henry, in his whole council, could not find one person, besides myself, to whom he could, without danger, disclose the whole of his designs; and that the respect due to him could scarce restrain those, who appeared most devoted to his service, from treating what, with the greatest circumspection, he had intrusted to them, as wild and extravagant chimeras." So true is sometimes the poet's exclamation—

> Truths would you teach, or save a sinking land?
> All fear, none aid you, and few understand.

But nothing discouraged that great prince, who was an abler politician and a better judge than all his council, and than all his kingdom. When he perceived that affairs, both at home and abroad, began to wear a favourable aspect, he then considered his success as infallible.

At this distance of time, and with our present imperfect knowledge of particular circumstances, it would be unwise to attempt a judgment, or even a conjecture, upon a detail of facts, existing at that age, and in the different states of Europe. But from general principles, and from our knowledge of some eminent characters, inferences, plausible and even satisfactory, may be drawn.

One inference may be drawn from the nature of the design, which Henry had formed. It was not a design inspired by mean and despicable ambition: it was not a design, guided by base and partial interests: it was a design, in the first place, to render France happy, and permanently happy: but as he well knew that France could not enjoy permanent felicity, unless in conjunction with the other parts of Europe; and as he was well pleased that the other parts of Europe should participate the felicity of France; it was the happiness of Europe in general which he laboured to procure; and to procure in a manner so solid and so durable, that nothing should afterwards be able to shake its foundations. May we not conclude, that, every thing else being equal, the probability is in favour of a great and good design? The fury and ravage of conquests have extended farther and wider, than the benevolent system of Henry the Great was meant or proposed to extend. Why should evil be more powerful or more enlarged in its operations than good? In private life, success is most frequently, though not universally, on the side of virtue: is it natural to expect a contrary rule in the administration of states and kingdoms? Is there not reason to hope that publick virtue will, on the whole, be triumphant; and that publick flagitiousness must, and should, and, at a proper time, will be degraded to the deepest abyss of humiliation?

These observations suggest general reasons in favour of the great design: other reasons may be drawn from the character, and talents, and virtues of the great man, who undertook its execution. It could not have been formed by one more eminently qualified to accomplish it. He possessed a courage capable of surmounting the greatest obstacles: he possessed a presence of mind, which saw and seized every opportunity of advantage: he possessed a prudence, which would not precipitate, but would calmly and patiently wait for the fit season of action: he possessed consummate experience, the result jointly of talents and of time. With all those great qualities as a soldier, as a statesman, and as a patriot, what was there, fair, or honest, or honourable, to which he could not form just pretensions? Had this enterprise failed in his hands, it would probably have failed for no other reason than this—that he was too great and too enlightened for the age in which he lived.

Had he been successful, the consequences of his success would, indeed, have been beneficial, lasting, and extensive. Those consequences would have reached not only his own subjects, not only the christian nations of Europe, but the whole world in general: of those consequences, the generation, at that time alive, the generations that have since succeeded, and those generations that are still to succeed, would have participated, down to the latest periods of time: those consequences would have been the source of all the sweets, which naturally flow from an uninterrupted and universal tranquillity.

Let me add another remark, which has been made in Europe, and which, with pride and joy, may be transferred to America. "Henry the Great has always had

the honour of being considered as the author of the most important invention for the benefit of mankind, that has yet appeared in the world; the execution of which may, perhaps, be reserved by Providence, for the greatest and most capable of his successours." This rich succession has been reaped in America. Here the sublime system of Henry the Great has been effectually realized, and completely carried into execution.

When the political bonds, by which the American States had been connected with Great Britain, were dissolved; when they assumed, among the powers of the earth, the separate and equal station, to which the laws of nature and of nature's God entitled them, the form of government, which each should institute for herself, and that form, if any, which all should institute for all, became objects of the most serious and interesting deliberation. With regard to this last, which is the object of our present discussion, four different systems lay before them; any one of which they might have adopted. They might have consolidated themselves into one government, in which the separate existence of the states would have been entirely absorbed. They might have rejected any plan of union or association, and have acted as distinct and unconnected states. They might have formed two or more confederacies. They might have united in one federal republick.

To support, with vigour, a single government over the whole extent of the United States, would, I apprehend, demand a system of the most unqualified and the most unremitted despotism: even despotism herself, extended so far and so wide, would totter under the weight of her own unwieldiness.

Separate states, numerous as those of America are, still more numerous as they must become, contiguous in situation, unconnected and disunited in government, would, at one time, be the prey of foreign force, foreign influence, and foreign intrigue; at another, the victims of mutual rage, rancour, and revenge.

Would it have been proper to have divided the United States into two or more confederacies? It will not be unadvisable to examine this object with accuracy and attention. Some aspects, under which it may be viewed, are far from being, at first sight, uninviting. Two or more confederacies would be each more compact and more manageable, than a single one extending over the same territory. By dividing the United States into two or more confederacies, the great collision of interests, apparently or really different or contrary, in the whole extent of their dominion, would be broken, and, in a great measure, disappear in the several parts. But these advantages, which are discovered from certain points of view, are greatly overbalanced by inconveniences, which will appear on a closer inspection. Animosities and, perhaps, wars would arise from assigning the extent, the limits, and the rights of the different confederacies. The expenses of governing would be multiplied by the number of federal governments. The danger, resulting from foreign influence and mutual dissensions, would not, perhaps, be less great and alarming in the instance of different confederacies, than in the instance of different, though more numerous, unassociated states. These observations, and many others which might be made on the subject, will be sufficient to evince, that a division of the United States into a number of separate confederacies would probably be an unsatisfactory and an unsuccessful experiment.

The only remaining system, that is to be considered, is the union of the American States into one confederate republick. It will not be necessary to employ many arguments to show, that this is the most eligible system, which could have been proposed. By adopting it, the vigour and decision of a wide spreading monarchy may be associated with the freedom and beneficence of a compacted commonwealth. On one hand, the extent of territory; the diversity of climate and soil; the number, and greatness, and connexion of lakes and rivers, with which the United States are intersected and almost surrounded, all indicate an enlarged government to be fit and advantageous for them. On the other hand, the principles and dispositions of their citizens indicate, that, in this enlarged government, liberty shall reign triumphant.

Agreeably to these principles, the United States have been formed into one confederate republick; first, under the articles of confederation; afterwards, under our present national government. The weakness and inefficiency of the former; the excellencies, the advantages, and the imperfections of the latter—for it has its imperfections, though neither many nor dangerous—we shall hereafter have an opportunity of showing. Our present purpose will be best answered by taking a general view of those principles, characters, and properties, which distinguish or ought to distinguish a confederate republick and its members.

"An overgrown republick," says the Marquis of Beccaria, in the exquisite performance, with which he has enriched the treasures of legislation—"an overgrown republick can be saved from despotism, only by subdi-

viding it into a number of confederate republicks. But how is this practicable? By a despotick dictator, who, with the courage of Sylla, has as much genius for building up, as that Roman had for pulling down. If he be an ambitious man; his reward will be immortal glory: if a philosopher; the blessings of his fellow citizens will sufficiently console him for the loss of authority, though he should not be insensible to their ingratitude."[z] In the United States, there is no occasion for the assumption of dictatorial power, in order to be enabled to perform supereminent services for the publick. Powers amply sufficient for the performance of the greatest services, the enlightened citizens of the United States know how to give. As they know how to give those powers, so they know how to confine them within the proper and reasonable limits.

If a commonwealth is small, it may be destroyed by a foreign power; if it is extensive, it carries within it the internal causes of its destruction. This double disadvantage affects equally democracies and aristocracies, whether they are well, or whether they are ill constituted. The former disadvantage is selfevident; and, therefore, requires no illustration. The latter may be evinced from the following considerations. In a very extended commonwealth, it is difficult, if not impracticable, to provide, at the same time, the three following requisites—a number of representatives, which will not be too large; opportunities of minute and local information, which will be sufficiently frequent and convenient; and a connexion between the constituent and representative, which will be sufficiently intimate and binding. The experience of

[z] Bec. c. 26.

ages evinces, that, where a certain excess in numbers prevails, regularity, decency, and the convenient despatch of business are expected in vain. On the other hand, when, to avoid an excessive number of representatives, one representative is allotted to too great a number of constituents; it is improbable, that the former should possess a sufficient degree of accurate and circumstantial knowledge, or of an interest, common, and, at the same time, peculiar, with the latter, to qualify him for the zealous and well informed discharge of his confidential trust. Add to these considerations, that, in a commonwealth, the proceedings and deliberations are too complicated and too slow for the emergencies of an extended government; to whose affairs and interests, simplicity and secrecy in council, and vigour and despatch in execution are of indispensable necessity. For these reasons, it is not unlikely, that mankind would, at last, have been obliged to submit always to the government of a single person, if they had not invented the form of a constitution, which is recommended by all the internal advantages of a republican government, and, at the same time, by all the force and energy of a government, which is monarchical. This form is a federal republick.

This form of government is a convention, by which several states consent to become citizens of a larger state, which they wish to form.[a] It is a society formed of other societies, which make a new one. This new one may be enlarged and aggrandized by the union of associates still new.

This kind of republick, fitted for resistance against exteriour attacks, is equally fitted to maintain its great-

[a] Mont. Sp. Laws. b. 9. c. 1.

ness without interiour corruption. It is formed for avoiding the inconveniences of that government, which is bad; and for securing the benefits of that, which is good.

In this kind of republick, the rights of internal legislation may be reserved to all the states, of which it is composed; while the adjustment of their several claims, the power of peace and war, the regulation of commerce, the right of entering into treaties, the authority of taxation, and the direction and government of the common force of the confederacy may be vested in the national government.

A confederate republick should consist of states, whose government is of the same nature; and it is proper that their government should be of the republican kind. Small monarchies are unfriendly to the genius of confederation. The spirit of monarchy is too often dominion and war; that of a commonwealth is more frequently moderation and peace. It is not likely, therefore, that these two kinds of government should subsist, on amicable terms, in the same confederated republick. Thus Germany, which consists of free cities and arbitrary monarchies, forms a confederacy, jarring and disjointed. Thus Greece was ruined, when the kings of Macedon obtained a seat among the Amphyctions. Hence we may see the propriety and wise policy of that article in the constitution of the United States,[b] which provides, that they shall guaranty to every state in the union a republican form of government.

[b] Art. 4. s. 4.

When we say, that the government of those states, which unite in the same confederacy, ought to be of the same nature; it is not to be understood, that there should be a precise and exact uniformity in all their particular establishments and laws. It is sufficient that the fundamental principles of their laws and constitutions be consistent and congenial; and that some general rights and privileges should be diffused indiscriminately among them. Among these, the rights and privileges of naturalization hold an important place. Of such consequence was the intercommunication of these rights and privileges in the opinion of my Lord Bacon, that he considered them as the strongest of all bonds to cement and to preserve the union of states. "Let us take a view," says he, "and we shall find, that wheresoever kingdoms and states have been united, and that union incorporated by a bond of mutual naturalization, you shall never observe them afterwards, upon any occasion of trouble or otherwise, to break and sever again."[c] Machiavel, when he inquires concerning the causes, to which Rome was indebted for her splendour and greatness, assigns none of stronger or more extensive operation than this—she easily compounded and incorporated with strangers.[d] This important subject has received a proportioned degree of attention in forming the constitution of the United States. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[e] In addition to this, the congress have power to "establish a uniform rule of naturalization throughout the United States."[f]

[c] 4. Ld. Bac. 243. [d] Id. 214. [e] Art. 4. s. 2.
[f] Art. 1. s. 8.

Though a union of laws is, by no means, necessary to a union of states; yet a similarity in their code of *publick*[g] laws is a most desirable object. The publick law is the great sinew of government. The sinews of the different governments, composing the union, should, as far as it can be effected, be equally strong. "In this point," says my Lord Bacon, "the rule holdeth, which was pronounced by an ancient father, touching the diversity of rites in the church; for finding the vesture of the queen in the psalm (who prefigured the church) was of divers colours; and finding again that Christ's coat was without a seam, concludeth well, in veste varietas sit, scissura non sit."[h]

Non omnibus facies una; sed qualis decet esse sororum.
OVID.

In a confederated republick, consisting of states of unequal numbers, extent, and power, the influence of each ought to bear a corresponding proportion. The Lycian republick was an association of twenty three towns. The large ones had three votes in the common council, the middling ones two, the small ones one. They contributed to the national expenses according to the proportion of suffrages. "Were I to give a model," says the celebrated Montesquieu,[i] "of an excellent confederate republick, I would pitch upon that of Lycia."

No one state, comprehended within a confederated republick, should be permitted to conclude an alliance with a foreign nation. This salutary regulation subsists

[g] 4. Ld. Bac. 224. 225. [h] 4. Ld. Bac. 215. [i] Sp. Laws. b. 9. c. 3.

not in the constitution of the Germanick Body. Hence the frequent dissensions and calamities, to which that great confederacy is constantly exposed, and with which it is frequently visited, through the rashness or the ambition of a single member.

With regard to foreign transactions, and with regard to those matters, which affect the general interests of the whole union, a confederated republick should be considered and should act as a single government or nation.

A union of hearts and affections, as well as a union of counsels and interests, is the very life and soul of a confederated republick. This is a subject, on which it is almost impossible to say too much, or to speak with too much zeal. We have, in former lectures,[j] seen how strong, how active, and how persevering are the operations and aims of our social powers. They are capable of being raised to the greatest height. They are capable of being enlarged to the greatest extent. But they partake of human imperfection: in their most useful and amiable forms, they sometimes degenerate into irregularity, abuse, and what I may call an excess of concentricity: by this I mean, overstrained exertions within a narrow and contracted sphere. Faction itself is frequently nothing else than a warm but inconsiderate ebullition of our social propensities.

How easily is the esprit du corps generated! How powerfully is it felt! How universally does it operate! How early does it appear! How ardent we see it in boys

[j] Ante ch. 7.

of different schools; and of different classes in the same school! With what emulation do they strive to outshine one another in their several tasks or sports! With what eagerness do the young men of neighbouring and rival towns—rival because they are neighbouring—contend for victory in their rural and manly exercises! Let the distinction be once formed—it is immaterial on what occasion, or from what cause—and its effects will be both strong and lasting. They will be beneficial or pernicious, according to the direction, which it first receives, and the objects to which it ultimately tends. How frivolous; how fierce; how obstinate; and how bloody were the contests of the Blues and Greens in the Hippodrome of Constantinople! The empire was sometimes shaken to its centre; and those, who produced the strong convulsions, could tell neither what they wished, nor why they were agitated. On the other hand; how often has the reputation of a regiment been preserved or heightened—how often, in battle, has victory been obtained or retrieved, by the wise encouragement and skilful application of the esprit du corps! This spirit should not be extinguished: but in all governments, it is of vast moment—in confederated governments, it is of indispensable necessity—that it should be regulated, guided, and controlled.

"The associating genius of man," says my Lord Shaftesbury, "is never better proved, than in those very societies, which are formed in opposition to the general one of mankind, and to the real interest of the state."[k] Extensive governments are particularly exposed to this inconvenience: to this inconvenience a national government, such as ours, composed of a great number of

[k] 1. Shaft. 114.

states, powerful, extensive, and separated, to a great distance, by situation, and, sometimes too, by an opinion of interest, not only from one another, but from the superintending power, by which they are connected—to this inconvenience, I say, such a national government is, of all, the most exposed—by this inconvenience, I add, such a national government is, of all, the most endangered. To embrace the whole, requires an expansion of mind, of talents, and of temper. To the trouble, though the generous trouble, of expanding their mind, their talents, and their temper, some will be averse from indolence, or what the indolent call moderation; others will be averse from interest, or what the interested call prudence. The former will encourage a narrow spirit by their example; the latter will encourage it by their exertions also. These last will introduce and recommend the government of their state, as a rival, for social and benevolent affection, to the government of the United States. The simplicity of some, the inexperience of others, the unsuspecting confidence, again, of others will be won by plausible and seducing representations; and, in this manner, and by these arts, the patriotick emanations of the soul, which would otherwise be diffused over the whole Union, will be refracted and converged to a very narrow and inconsiderable part of it.

Against this ungenerous application of one of the noblest propensities of our nature, the system of our education and of our law ought to be directed with the most vigorous and unremitted ardour. This application of that noble propensity is not merely ungenerous: it is no less unwise. It is unwise, as to the person, who makes it; it is unwise, as to the state, to the advantage of which it is supposed to be made. Apply and extend,

in favour of the Union, the same train of reflection and argument which is used in favour of the state. With regard to the latter, will it not be allowed—will it not be urged—will it not be properly urged, that the interest of the whole should never be sacrificed to that of a part, nor the interest of a greater part to that of a part, which is smaller? Will it not be allowed—will it not be urged, that to think or act in a contrary manner, would be improper and unwise? Why should not the same reasoning and the same conduct be allowed—why should they not be urged—for they may be urged with equal propriety—in favour of the interests of the Union, or of the greater part of the Union, compared with those of a single member, of which that Union is composed?

But it will be seldom, if ever, necessary that the interest of a single state should be sacrificed to that of the United States. The laws, and government, and policy of the union operate universally and not partially; for the accomplishment of general and not of local purposes. On the other hand, the laws, and government, and policy of a particular state, compared with the Union, operate partially and not universally; for the accomplishment of purposes, which are local, and not general. If, then, on any subject, a difference should take place between the sentiments, and designs, and plans of the national government and those of the government of a single state; on whose side are justice and general utility likely to be found? It is to be presumed that they will be found on the side of the national government. That government is animated and directed by a representation of the whole Union: the government of a single state is animated and directed by a representation of only a part, inconsiderable when compared with the whole. Is it

not more reasonable, as well as more patriotick, that the interests of every part should be governed, since they will be embraced, by the counsels of the whole, than that the interests of the whole should be governed, since they will not be embraced, by the counsels of a part?

Expanded patriotism is a cardinal virtue in the United States. This cardinal virtue—this "passion for the commonweal," superiour to contracted motives or views, will preserve inviolate the connexion of interest between the whole and all its parts, and the connexion of affection as well as interest between all the several parts.

Let us, then, cherish; let us encourage; let us admire; let us teach; let us practise this "devotion to the publick," so meritorious, and so necessary to the peace, and greatness, and happiness of the United States.

"The central parent-publick calls
Its utmost effort forth, awakes each sense,
The comely, grand, and tender. Without this,
This awful pant, shook from sublimer powers
Than those of self, this heaven-infused delight,
This moral gravitation, rushing prone
To press the publick good, *our* system soon,
Traverse, to several *selfish* centres drawn,
Will reel to ruin."

2. *Thom. Works.* 158.

"— To avoid this fate,
Let worth and virtue—
Exerted full, from every quarter shine,
Commix'd in heightened blaze. Light flash'd to light,
Moral or intellectual, more intense
By giving glows. As on pure winter's eve,
Gradual, the stars effulge; fainter, at first,

They, straggling, rise: but when the radiant host,
In thick profusion poured, shine out immense,
Each casting vivid influence on each,
From pole to pole a glittering deluge plays,
And worlds above rejoice, and men below."

2. *Thom. Works.* 162.

CHAPTER IX.

OF MAN, AS A MEMBER OF THE GREAT COMMONWEALTH OF NATIONS.

EVERY civil society, under whatever form it appears, whether governed merely by the natural laws of such a society, or by them and civil institutions superadded—every such society, not subordinate to another, is a sovereign state.

Those, who unite in society, lived, before their union, in a state of nature: a state of nature is a state of equality and liberty. That liberty and that equality, belonging to the individuals, before the union, belong, after the union, to the society, which those individuals compose. The consequence is, that a society is subjected to no power or authority without it; that it may do what is necessary for its preservation; that it may exercise all its rights, and is obliged to give an account of its conduct to no one. But these things constitute

what is called sovereignty. Every state, therefore, composed of individuals, free and equal, is a state sovereign and independent. The aggregate body possesses all the rights of the individuals, of whom it is formed.

Another consequence is, that the rights of any one state are naturally the same as those of every other. States are moral persons, who live together in a natural society, under the law of nations. To give a state a right to make an immediate figure in the great society of nations, it is sufficient, if it be really sovereign and independent; that is, it must govern itself by its own authority.[a] Thus, when the United Colonies found it necessary to dissolve the political bonds, which had connected them with Great Britain, and to assume among the powers of the earth the separate and equal station, to which the laws of nature and of nature's God entitled them; they had a right to publish and declare, as, in fact, they did publish and declare, that "they were free and independent states; and that, as free and independent states, they had full power to levy war, to conclude peace, contract alliances, establish commerce, and to do all other acts and things, which independent states may of right do;" though, at that time, no articles of confederation were agreed upon; nor was any form of civil government instituted by them.

A number of individuals, who have formed themselves into a society or state, are, with regard to the purposes of the society, bound to consider themselves as one moral person. But the rest of mankind, who are not parties to this social compact, are under no obliga-

[a] Vat. b. 1. a. 4.

tion to take notice of it; and may still consider the society as a large number of unconnected persons. This personality—I know no better expression for it—of a state must, as to other nations, be derived from their consent and agreement. But when a society have once associated, and considered and announced themselves to other nations as a moral person, this consent and agreement ought not to be refused, without solid and special reasons, which will justify the refusal. On this consent and agreement, the mutual and mutually beneficial intercourse of nations is founded: whatever, therefore, promotes this intercourse, should be zealously encouraged; whatever prevents or interrupts it, should be cautiously avoided.

Though one state has, by an unequal alliance, formed a connexion with another state more powerful; still the weaker state is to be reckoned in the class of sovereigns. To the weaker state, the unequal alliance may secure the most assistance; on the stronger, it may reflect the most honour; but it leaves both the same rank among the society of nations.

We may go further; if a state, in order to provide for its own safety, finds it necessary to place itself under the protection of another; and, in consideration of that protection, stipulates to perform equivalent offices, without devesting itself of the right of self-government; such a state ceases not to preserve its place among sovereigns. The payment even of tribute, though it may diminish the dignity of the society, by no means destroys or impairs its sovereignty or its rights.

Two sovereign states may employ the same executive magistrate, or bear allegiance to the same prince, without any dependence on each other; and each may retain all its national rights, free and undiminished. This last, under the house of Stuart, was the case of England and Scotland, before the nation of Great Britain was formed by their union. This last, also, as shall be hereafter shown at large, was the case of Great Britain and the American colonies, before the political connexion between them was declared to be dissolved.

But one people who have passed under the *dominion* of another, can no longer form a state: they can no longer retain a place in the great society of nations. Of that great society, equality is the basis and the rule. To this equality, the inferiority of subjection and the superiority of command are, alike, repugnant.

This equality of nations is the great and general foundation of national rights. In this matter, no regard is had to names. On the great theatre of the world, empires, kingdoms, commonwealths, principalities, dukedoms, free towns, are all equally imperial. A society, which, without subordination to any other, exercises within itself all the essential powers of society, is sovereign, and has all the rights of a sovereign and independent state; however narrow its territories; however small its numbers may be.

Every nation deserves consideration and respect; because it makes an immediate figure in the grandest society of the human race; because it is independent of all earthly power; and because it is an assemblage of a number of men, who, doubtless, are more considerable than any individual.

With regard to precedency, or the first place among equals, power and antiquity are grounds, upon which it is claimed or allowed. Into this question, the forms of government do not enter.

The natural state of individuals we have already seen to be a state of society and peace: such also is the natural state of nations. This state, it is the duty of nations, as well as of individuals, to preserve and improve. But among nations, as well as among individuals, differences and causes of difference will, sometimes, unavoidably arise. Over independent nations there is no coercive authority, to which recourse may be had for a decision of their controversies. What, then, shall be done, in order to terminate or adjust them? Much may be done; much ought to be done, before the fatal appeal is made to the dernier resort of sovereigns.

In some peculiar situations, it is more prudent, as well as more honourable, to abandon than to claim a right; to disregard, than to resent an injury: but, by nations, even this laudable and generous conduct should be observed with great prudence and circumspection, and in such a manner as, instead of cowardice, to discover magnanimity. When this conduct can be so observed, what a glorious example does it exhibit to the world! "A king of France ought not to revenge the wrongs of a duke of Orleans," was nobly said by a monarch of an elevated mind. Might it not also be said, that it is not every petty offence, which ought to provoke the dignified energy of sovereign power? Suppose a picture, disrespectful to Lewis the fourteenth, had been exhibited in Holland; was this a sufficient occasion for drawing forth the great monarch at the head of the armies of France?

Was it a sufficient occasion for drawing him forth at the head of those armies against a power, comparatively inconsiderable, and trembling to its centre from a conscious sense of its own inferiority?

Nec deus intersit, nisi nodus vindice dignus.

On some occasions, it may be proper to claim a right, or take notice of an injury, merely with a determined and heroick purpose of ceding the former, and of forgiving the latter. This mode of proceeding, adopted at a proper time, in a proper manner, and by a proper person, has a great and a useful effect. It displays the good sense and superiour judgment of him, who observes it; and secures the esteem, perhaps the friendship of him, towards whom it is observed.

Controversies often happen, when neither of the parties to them is intentionally wrong: they arise from misapprehensions or mistakes. In such cases, nothing more is necessary for an amicable accommodation, than candid conference and mutual explanation. "There are two kinds of disputation," says Cicero,[b] "one, by argument and reason; the other, by violence and force. To determine controversies by the former belongs to man; by the latter, to the brutes. To the latter we ought never to have recourse, but when all hopes of success by the former are proved to be unavailing." If in every minute particular, an entire coincidence of sentiment and interest cannot take place; concessions, in the course of a negotiation, may be made on both sides; and, in this manner, a satisfactory adjustment of every difference may be effectuated.

[b] De off. l. 1. c. 11.

If the parties themselves, notwithstanding their peaceful and proper inclinations, cannot finally agree upon the terms, according to which the difference should be adjusted; those terms may, in many instances, be arranged and settled by the kind and benevolent mediation of a common friend. Delicate, indeed, but highly useful is the office of a mediator. Address, prudence, a winning smoothness, but, above all, a most strict impartiality are the rare qualifications, which he ought to possess. Possessing these, he will favour what is due to justice and right; but remembering, at the same time, that his office is to conciliate, and not to judge, his leading effort will be to preserve or to procure peace, and to prevail on him, who has even justice on his side, to relax something, if such a relaxation shall be necessary for accomplishing a purpose so desirable and so humane. In the Alcoran, it is delivered as an indispensable injunction, that if two nations of the faithful will go to war, the others shall interpose and force the aggressor to make satisfaction, and afterwards lay both under an obligation to live, for the future, in peace and friendship. [c]

If, unfortunately, neither negotiation nor friendly interposition of disinterested and benevolent powers shall prove effectual, for determining a controversy between two nations; there is another method remaining, by which mutual irritation and, much more, dreadful extremities may be prevented between those, who have no common judge upon earth, to whom they can appeal. This method is, to refer the matter in dispute to the award of arbitrators.

This mode of decision has been embraced by nations, the most powerful and the most wise. When the Athe-

c Puff. 556. b. 5. c. 13. s. 7.

nians and the citizens of Megara had a dispute concerning the property of the island of Salamis, five Lacedemonian umpires were chosen to settle their contested claims. Some of the Italian states, in the early ages of Rome, submitted their controversies to the determination of the Romans. The Romans themselves, haughty and domineering as they were, and proud of the character *debellare superbos*, proposed to the Samnites, that the subject of their contention should be referred to the arbitration of their common friends and allies.[d] The Druids, those revered ministers of a mysterious superstition, were the umpires between nations at war, and frequently brought matters to an accommodation, when the belligerent powers were on the very instant of an engagement. "It is cruel and detestable," says Thucydides, "to treat him as an enemy, who is willing to submit his case to an arbitration."[e]

In all their alliances with one another, and even in those, which they have formed with the neighbouring powers, the Swiss have used the wise precaution to ascertain, beforehand, the manner, in which their differences should be left to the award of arbitrators, in case it should prove impracticable to adjust them upon amicable terms. This prudent and judicious policy has contributed, in no small degree, to maintain the Helvetian republick in that flourishing state, which has secured its liberty, and rendered it respectable over all Europe.[f]

When the sentence of the arbitrators is given, it ought to be obeyed; unless it be flagrantly partial, manifestly unjust, or clearly beyond the powers given by

[d] Liv. l. 8. c. 23. [e] Gro. 486. 487. [f] Vatt. b. 2. s. 329.

the submission. If the award is upon the very point disputed, it can never be manifestly unjust, since it has been rendered doubtful by the dissension of the parties.

It has been the opinion of some very respectable and well informed writers, that it would be highly convenient, and even somewhat necessary, that congresses of a number of states should be held, in which the differences of contending parties might be determined by those altogether disinterested in them; and in which, likewise, some effectual means might be devised and carried into execution, for compelling nations at war to conclude a peace upon fair and equitable conditions. In the course of the present century, two general congresses have been held in Europe—one at Cambray; the other at Soissons: but they were nothing more than pompous farces, acted, with great parade, by those, who wished to appear solicitous for an accommodation, but who, in fact, were little solicitous to promote it.[s]

If justice cannot be obtained in any of the peaceful modes abovementioned; a nation has then a right to do itself justice. But even this ought to be done, when it can possibly be done, without proceeding to the last direful necessity of commencing a war. Reprisals may be made. If one nation has got into its possession what belongs to another, and will not restore it; if it refuses to pay a just debt, or to make reparation for an injury; that other nation may seize property belonging to the first, may apply it for its own benefit, in discharge of what is due, together with interest and damages; or it may hold the property in pledge, until satisfaction be made.

[s] Vat. b. 2. s. 330.

The subject of reprisals is so delicate and interesting that the nature and the extent of the right to make them deserve a careful and accurate investigation.

We have already seen,[h] that a nation is to be considered as a moral person, having an understanding and will peculiar to itself: as such it is considered by the law of nations. The consequence necessarily is, that every act of this moral or collective person must, in the view of that law, be the concurrent act of its several members.

From the same principles, the property of each of the members must, with regard to other states, be deemed the property of the whole nation. In some degree, this is, in truth, the case; because the nation has power over the riches of the citizens; and because those riches form a part of the national wealth. All those, who compose a nation, making, in the consideration of foreign states, one whole, or one single person; all their property must be considered as the property of that single person. It is in the power of a nation to establish, among its citizens, a community of goods; but whether this is done, or is not done, the separate property of those citizens can neither be known nor discriminated by other states. The unavoidable result is, that, if one nation has a right to any part of the goods of another, it has a right to the goods of its citizens, till the right be satisfied or discharged. The unavoidable result, again, is, that when it is justifiable to make reprisals, they may be made on the property of any of the citizens, as well as on that of the nation. From this rule,

[h] Ante p. 304. 305.

one exception has been made, and deserves to be established. This exception is made in favour of a deposit trusted to the faith of the nation, which has a right to make reprisals. This deposit has been made only in consequence of the reliance, which the owner had on this faith: this faith ought to be respected, even in the case of an open and declared war. For this reason, in France, in England, and in some other countries of Europe, the money, which hostile foreigners have placed in the publick funds, has been considered as sacred from the rights of reprisals, and even of war.

He who, for the injustice done by a nation, makes reprisals upon the property of its citizens indiscriminately, cannot be accused of seizing the property of one person in order to satisfy the debt of another. It is a demand against the state, to the discharge of which every citizen is bound to contribute his just proportion. It is the duty and business of the nation to provide, that those citizens, upon whom the reprisals fall immediately, should be indemnified for every thing beyond that share, which, on a fair assessment, they ought to pay. The nation ought to go farther: if the reprisals have been occasioned originally by the injustice or violence of some of its members; those members should be compelled to make satisfaction for every loss, which has arisen from their conduct.

Though the property of the private citizens, from the nature and the necessity of the case, must, in many, perhaps, in most instances, be considered by foreign states as liable for their demands against the nation; yet where publick property can be known and certainly distinguished, it is unquestionably proper, that such pro-

perty should, in the first place, be the selected object of reprisals, if to reprisals it be easily or conveniently accessible. The principles of humanity and the dictates of magnanimity suggest, with equal force, the reasonableness and propriety of this discrimination, whenever it can be made.

As the property of a nation, or of the citizens of a nation, may be seized by reprisals, in order to compel it to do justice; so, on some occasions, the citizens themselves may be seized, in consequence of the same principles, and may be detained until full satisfaction has been received. This mode of proceeding was known among the Grecians by a name, which may be literally translated *mancatching;* Ἀνδρολη̃ψια. At Athens, the law permitted the relations of him, who had been assassinated in a foreign country, to apprehend three persons of that country, and detain them, till the assassin was punished or delivered up.

In making reprisals, three precautions should be inviolably observed. 1. They ought not to be made without the authority of the nation. Though reprisals are not war; and though their proper use is to prevent war; yet they approach to a war, and are often followed by one. They are, therefore, proceedings of too much publick moment, to be carried on under the direction and at the discretion of individuals; probably, of individuals immediately and particularly interested in them. In all civilized countries, therefore, it is the unvaried practice, that when a citizen considers himself as injured by a foreign state, he applies to the sovereign power of his nation for permission to make reprisals. 2. Reprisals ought to be made only for a demand, which is both just

and certain. If it be doubtful or unliquidated, the first application should be for such steps as may be necessary to ascertain its reasonableness and its extent. 3. The reprisals should be in a due proportion to the demand. General reprisals, the grand pensionary De Wit used to say, were scarcely to be distinguished from an open war.

We have now seen that the citizens, in their persons and in their fortunes, may be accountable for the conduct of the nation: so, on the other hand, the nation may sometimes be accountable for the conduct of its private citizens.

The state should protect the citizen, should defend him from injury, and should procure reparation for injuries which he has sustained. So, likewise, the nation should not suffer its citizens to commit injuries against the citizens of other states; it ought to disclaim the conduct of such as offer injuries; and ought to compel or to give satisfaction for the injuries which have been offered.

It is impossible, however, that, even in the best regulated state, the government should be able to superintend the whole conduct of all the citizens, and to restrain them within the precise bounds of duty and obedience: it would be unjust, therefore, to impute to the nation, or to the government, all the faults or offences, which its members may commit. Hence it does not necessarily follow, that one has received an injury from a nation, merely because he has received an injury from a citizen belonging to that nation. To a whole state, the follies, the injuries, or the crimes of a particular person ought not to be immediately ascribed: in every

state, wicked and disorderly citizens are unhappily to be found: let such be held responsible for the consequences of their crimes and disorders.

This doctrine is certainly reasonable and just; but if a nation wishes not to be involved in the punishment of her citizens, she should sedulously avoid the impropriety and the offence of becoming an accomplice in their injuries and crimes. In their injuries and crimes she becomes an accomplice, when she approves or ratifies them, and when she affords protection and security to those, who have committed them. In such cases, the nation may justly be considered as even the author, and the citizens as only the instruments, of the wrong or outrage which has been done.

When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made; should punish him according to the measure of his offence; or, when the nature and the circumstances of the case require it, deliver him up to the offended state to meet his doom there. This is frequently done with regard to atrocious crimes, such as are equally contrary to the laws and the safety of all nations.

In states, which are most strictly connected by friendship and good neighbourhood, they go farther still. Even with regard to common injuries, which are prosecuted civilly, whether for reparation of damage, or for a slight civil punishment, the citizens of two neighbouring states are reciprocally compelled to appear before the magistrate of the country, in which they are accused of having offended. On a requisition of this magistrate, which is called a letter rogatory, they are cited judicially, and

compelled by their own proper magistrates to appear. "An admirable institution!" exclaims Vattel,[i] in a tone of admiration, "by which many neighbouring states live together in peace and harmony, and seem to form but one and the same commonwealth." This institution is in force through all Switzerland.

If we could restrain, would it be proper to restrain the pleasing and animating reflection, that even the most admired institutions of Europe are improved, while they are adopted by the United States? For the trial and punishment of every kind of offence, prosecuted criminally, and, therefore, on common law principles, locally, the following provision is made in our national constitution.[j] "A person charged, in any state, with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state, having jurisdiction of the crime." In civil causes of a transitory nature, no such provision is necessary; but a much better one is made. In Switzerland, controversies depending between citizens of different states must be decided by the magistrates of a state, of which one party, but not the other, is a citizen. But, in the United States, for controversies depending between citizens of two different states, a tribunal is formed and established, impartial, and equally independent of both.

The foregoing remarks exhibit, in a very striking point of view, the numerous, the near, and the important relations, by which states and the members of states may

[i] B. 2. s. 76. [j] Art. 4. s. 2.

be connected together. We here discover the much famed institutions of Alfred the Great, extended on a national scale. In the great society of nations, we see each citizen bound for the good behaviour of all, and all bound for the good behaviour of each. As the principles of society, humanity, benevolence, and liberality shall become more and more regarded and cultivated, the rights and duties of different nations, and of the citizens of different nations, will become more and more studied, and will be better and better practised and observed. In this study, the present century has witnessed great and manifest improvements. In this study all men are interested: it is rich in delight: it is inestimable in importance: its maxims should be known by every citizen of every free state.

The relations existing between different states and the citizens of different states, and the rights and duties arising from those relations, form a constituent part of the common law. In that country, from which the common law has been brought, the law of nations has always been most respectfully and attentively adopted and regarded by the municipal tribunals, in all matters, concerning which it is proper to have recourse to that rule of decision. The law of nations, in its full extent, is a part of the law of England. [k] The infractions of that law form a portion of her code of criminal jurisprudence. In civil transactions between the citizens of different states, that law has, in England, been received in its most ample latitude.

One branch of that law, which, since the extension of commerce, and the frequent and liberal intercourse

[k] 3. Burr. 1481.

between different nations, has become of peculiar importance, is called the law of merchants. This system of law has been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event.[1] This system has, of late years, been greatly elucidated, and reduced to rational and solid principles, by a series of adjudications, for which the commercial world is much indebted to a celebrated judge, long famed for his comprehensive talents and luminous learning in general jurisprudence.

Another branch of the law of nations, which has also become peculiarly important by the extension of commerce, is the law maritime. In a cause depending in the court of king's bench in England, and tried at one of the assizes, my Lord Mansfield, the great judge to whom allusion has been just now made, was desirous to have a case made of it for solemn adjudication; not because he himself entertained great doubts concerning it; but in order to settle the point, on which it turned, more deliberately, solemnly, and notoriously; as it was of an extensive nature; and especially as the maritime law is not the law of a particular country, but the general law of nations: non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.[m]

[1] In commercial cases, all nations ought to have their laws conformable to each other. Fides servanda est; simplicitas juris gentium prævaleat. 3. Burr. 1672.

[m] 2. Burr. 887.

In the plan of my lectures, I proposed a question, the greatness of which is selfevident—How far, on the principles of the confederation, does the law of nations become the municipal law of the United States? I mentioned, that it would be unwise, at that time, to hint at an answer. An answer I mean not to give even now: but I deem it highly proper now to state the nature, the extent, and the importance of the question. It points to a course new and unexplored.

We have seen the divine origin; we have seen the amazing extent; we have seen the uncommon magnitude of the law of nations: we have, in part, seen, likewise, how ineffective the execution of that law, under human authority, has hitherto been.

Amicable agreement between parties in controversy has been recommended, and recommended with great propriety, where the recommendation can take effect: but controversy, which has arisen, and which, from the very supposition of the case, subsists between the parties, is certainly not the most natural guide to lead to an amicable accommodation. The mediation of a disinterested and benevolent power has been recommended likewise: but this mediation, though it enhances the merit and displays the beauty of the candid, the peaceful, and the disinterested virtues, affords no reasonable security, that the exertion of those virtues will be accompanied with the wished for effect. To arbitration recourse has been advised: but to the institution of arbitrators, the previous consent of the parties in controversy is requisite: and how, against the unwilling, is the award of the arbitrators to be enforced?

What is next to be done? The same disposition or the same mistake, which, on one of the sides, must have given birth to the controversy, will probably communicate to it vigour and perseverance. Nay, that disagreement of mind between the parties, which must have taken place when the controversy commenced, is likely to be increased, instead of being diminished, by the frequent, numerous, and mutual irritations, which will unavoidably happen in the prosecution of it. All the modes of adjustment, which have been hitherto mentioned, presuppose the reconciliation of irritated minds. But must the peaceful adjustment of controversies between states—an adjustment so salutary and so necessary to the human race—depend on events so very precarious, so very improbable? Must the alternatives in disputes and differences between the dignified assemblages of men, known by the name of nations, be the same, which are the prerogatives of savages in the rudest and most deformed state of society—voluntary accommodation, or open war, or violent reprisals, inferiour, in odium, only to war? Individuals unite in civil society, and institute judges with authority to decide, and with authority also to carry their decisions into full and adequate execution, that justice may be done and war may be prevented. Are states too wise or too proud to receive a lesson from individuals? Is the idea of a common judge between nations less admissible than that of a common judge between men? If admissible in idea, would it not be desirable to have an opportunity of trying whether the idea may not be reduced to practice? To return to the original question—has or has not our national constitution given us an opportunity of making this great and interesting trial?

Let us turn our most scrutinizing attention to the situation, in which, on the principles of that system, the states and the people, composing the American Union, stand with regard to one another; the situation, in which they stand with regard to foreign nations; and the situation, in which they stand with regard to the government of the United States.

With regard to one another, they have, by ordaining and establishing the national constitution, engaged to "form a more perfect union," "to ensure domestick tranquillity," "to establish justice:"[n] they have engaged "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;"[o] they have engaged that no state shall enter into "any treaty, alliance, or confederation;"[p] "nor, without the consent of congress, into any agreement or compact with another state."[q]

With regard to foreign nations, the states, composing the American Union, have made an engagement precisely in the terms of the last mentioned engagement, which they have made with regard to one another—absolutely to enter into no treaty, alliance, or confederation with foreign nations; and to enter into no agreement or compact with them, unless with the consent of congress.[r]

With regard to the government of the United States, they have engaged that the judicial power of the United States shall extend "to controversies between two or more states; between a state and the citizens of another

[n] Preamb. [o] Art. 4. s. 2. [p] Art. 1. s. 10.
[q] Ibid. [r] Ibid.

state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."[s]

The law of nations respecting treaties, alliances, and confederations must be thrown entirely out of the question: these are absolutely interdicted.

The law of nations respecting agreements and compacts between two or more states; between a state and the citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects, will still be applicable, as before the national constitution was established, to controversies arising in all those different enumerated cases.

In all those different enumerated cases, the tribunals of the United States have judicial authority to decide. By what law shall their decisions be governed? Before the establishment of the national government, controversies happening in those enumerated cases, if determined at all, must have been determined by the principles and rules of the law of nations. But before that establishment, there was no power to determine them judicially by any law.

We have already seen that, in England, the courts of common law, in cases, to which the law of nations, and particularly in cases, to which one great branch of it,

[s] Art. 3. s. 2.

the law of merchants is applicable, have made approved application of that law, and have received it, in its fullest extent, as a part of the law of England. Should a similar conduct be observed by the tribunals of the United States, in the numerous and very important cases, to which the national constitution extends their judicial authority?

If a similar conduct ought to be observed by these tribunals; what an immense improvement has taken place in the application and administration of the law of nations! Hitherto that great law has been applied and administered by the force or by the pleasure of the parties in controversy: in the United States, it can now be applied and administered by impartial, independent, and efficient, though peaceful authority.

This deduction, if properly founded, places the government of the United States in an aspect, new, indeed, but very conspicuous. It is vested with the exalted power of administering judicially the law of nations, which we have formerly seen to be the law of sovereigns.

It has been already observed, that the maxims of this law ought to be known by every citizen of every free state. Reasons, and very sufficient ones, were suggested, why this should be the case. A new reason, striking and illustrious, now appears, why the maxims of this law ought to be particularly known and studied by every citizen of the United States. To every citizen of the United States, this law is not only a rule of conduct, but may be a rule of decision. As judges and as jurors, the administration of this law is, in many important instances, committed to their care.

What a beautiful and magnificent prospect of government is now opened before you! The sluices of discord, devastation, and war are shut: those of harmony, improvement, and happiness are opened! On earth there is peace and good will towards men! On contemplating such a prospect, though only by the eye of a sublime imagination, well might the ardent and elevated Henry address the congenial ardour and elevation of Elizabeth—O most excellent and rare enterprise—Thought rather divine than human!

To us this prospect is realized by happy experience: how thankful ought we to be in enjoying it! how zealous should we be to secure it to ourselves and to our latest posterity! how anxious should we be to extend its example, its influence, and its advantages to the remotest regions of the habitable globe!

CHAPTER X.

OF GOVERNMENT.

WE have already seen, that society may exist without civil government: indeed, if we would think and reason with accuracy on the subject, we shall necessarily be led to consider, in our contemplation, the formation of society as preexistent to the formation of those regulations, by which the society mean, that their conduct should be influenced and directed.

It is necessary that this distinction be plainly made, and clearly understood. It has been controverted by some: an inattention to it has produced, in the minds of others, practical inferences, which are both ill founded and dangerous. A change of government has been viewed as a desperate event, as an object of the most terrifick aspect; because it has been thought, that government could not be changed, without tearing up the very foun-

dations of the social establishment. It has been supposed, that, in a transition from one government to another, the body making it must be dissolved; that every thing must be reduced to a state of nature; and that the rights and obligations of the society must be lost and discharged.

In many parts of the world, indeed, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and of all the calamities attendant on wars.[a] But joyful experience teaches us, in the United States, to view them in a very different and much more agreeable light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind.

It is true, that institutions, which depend on the form or structure of the preceding government, must fall, when that form or structure is taken away. But establishments, whose foundations rest on the society itself, cannot be overturned by any alteration of the government, which the society can make. The acts and compacts which form the political association, are very different from those by which the associated body, when formed, may choose to maintain and regulate itself.

But though, without government, society may exist; yet it must be admitted, that, without government, society, in the present state of things, cannot flourish;

[a] Changes in course of government are looked at as uncouth motions of the celestial bodies, portending judgments or dissolution. Bac. on Gov. 7.

far less, can it reach perfection. In a state of nature, it is true, any one individual may act uncontrolled by others; but it is equally true, that, in such a state, every other individual may act uncontrolled by him. Amidst this universal independence, the dissensions and animosities between the interfering members of the society, would be numerous and ungovernable. The consequence would be, that each member, in such a natural state, would enjoy less liberty, and suffer more interruption and inconvenience, than he would under a civil government.

Again; it is true, that, by the fundamental laws of society, obedience is stipulated on the part of the members, and protection is stipulated on the part of the body. But the modes, and extent, and particular objects of this obedience, and the modes, and extent, and particular instruments of this protection, are all equally unascertained. Precision and certainty in these points, so important to the peace and order of society, can be obtained only by a system of government. In addition, therefore, to the rules, which necessarily enter into the formation of society, other rules—those, which compose government—have been gradually introduced into every community, which has attained any considerable degree of improvement.[b]

How the different governments, which have successively appeared in the different parts of the world, began; on what principles they were originally formed;

[b] Sine imperio, nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest. Cic. de leg. l. 3. c. 1.

what share in their formation should be ascribed to stratagem, what to force, what to necessity, what to conveniency, what to wisdom, what to patriotism—all these are questions, which would employ, and the answers to which would gratify curiosity: some of them would convey much pleasure and instruction: but, with regard to many of them, complete information cannot be obtained; and if it could, it would not be accompanied with a proportioned degree of satisfaction. The origin of many governments is obliterated or obscured by the impressions of all-corroding time. Some exceptions, however, there are; and of those exceptions, some deserve to be considered with careful and patient attention: they contain matter of wise example, or of prudent caution.

From ancient history I select one instance, the particulars of which are transmitted to us with a considerable degree of accuracy and minuteness. The Medes originally were included in the great empire of Assyria: from this empire they separated themselves by a successful revolt. After their separation, they continued, for some time, without any established form of government—in a state of self-command, as the expression used by Herodotus denotes. Of this state, they soon began to experience the infelicities: injuries were committed; controversies arose; dissensions took place: there was no settled or acknowledged authority to repress animosities, to determine disputes, or to order reparation for injustice that had been done.

One man there was, whose integrity and wisdom taught his countrymen to revere him, and to apply to him as the judge and arbiter of their differences. This

was the famed Dejoces. His decisions were equitable; but the execution of them depended on the pleasure of the parties, against whom they were made. Influence, however, and reputation supplied, in some tolerable degree, the place of regular and established authority; and the Medes confided and acquiesced in the prudence and justice of Dejoces.

Stimulated by latent principles of ambition, or directed by the admonitions of sagacity, Dejoces became dissatisfied with the situation, in which he stood. Perhaps he wisely foresaw, that unless he possessed authority at the same time that he deserved confidence, he could not be long safe in his own person, or useful to his fellow citizens. Another supposition there is likewise reason to make. Perhaps his ambition suggested to him, that the influence, which he already enjoyed, might, by an easy and a certain transition, be converted into power; that the voluntary acquiescence under his awards might be improved into implicit submission to his edicts; and that the respected judge might become the splendid monarch of Media. Whatever his motives were, we know what was their result. He would not exercise any longer the confidential office of administering justice among the Medes; but had recourse to a retired life, under the pretence, that he could no longer support the excessive fatigue of the business of others; and that it was now become absolutely necessary for him to devote his attention to the management of his own affairs.

The consequence, which was naturally expected, naturally followed. The disorders, which the character and influence of Dejoces had repressed, returned, upon his retirement, with redoubled violence; and increased

to such a degree, that the Medes were obliged to convene a general council of the nation, in order to deliberate upon the proper methods of finding and applying a remedy to the publick miseries and dissensions. The expedient adopted by the general council was, that a king should be elected, who should have power to restrain the rage of violence, and to make laws for the government of the nation. When it was determined to elect a king; there was no hesitation concerning the person, on whom the election should fall. With common consent, Dejoces was elected king of Media. [c]

With regard to the first establishment of civil government, it is probable, that the maintenance of publick peace and the promotion of publick happiness were the ends originally proposed by the people, in many instances. It is certain, that, in every instance, they were the ends, which by all ought to have been proposed and prosecuted too. One thing is unquestionable, and this, indeed, is all that is necessary to be known upon the subject; that every man must have had his own advantage and happiness in view; and must have endeavoured, as much as possible, to preserve his natural liberty. This is founded on the constitution of mankind; and this invincible principle would operate with greater force on the first formation of government, than after it was fully established; for under established governments, the natural love of liberty is frequently counteracted by education, by prejudice, by interest, by ambition. Of this melancholy, but undeniable truth, the history of man and of government produces too many striking examples. The degeneracy of government, and the consequent degeneracy of the

[c] Rol. An. Hist. b. 3. c. 3. 3. Gog. Or. Laws, c. 9.

citizens, have been fruitful topicks of contemplation and complaint, in almost every age and country.

It is a question rather of curiosity than of utility—what kind of government is the most ancient? The different kinds have different advocates in favour of their antiquity; and their different hypotheses are supported with much ingenuity and zeal. The ardour of polemical disquisition, however, upon this subject, might have been greatly softened by the obvious reflection, that it by no means follows, that the kind of government which is oldest, is the kind which is also best. That form which was most simple, and not that form which was most perfect, would, in all probability, attract the attention, and determine the choice, of a rude and inexperienced society. In many parts of the world, the science of government is even yet in a state of nonage: shall its first be deemed its most finished movements?

The most simple form of government is that of monarchy: reasonable conjecture, therefore, would lead us to presume, that this form is the most ancient. This presumption of reason is confirmed by the information of history, both sacred and profane. The most ancient nations mentioned by the inspired historian and legislator of the Hebrews—for instance, the Egyptians, the Babylonians, the Assyrians—were all under the government of kings. Homer, the true original of his own Ulysses, who knew societies as well as men, seems scarcely to have seen, or heard, or even imagined any other species of government, than that which was monarchical. The most famous states of antiquity, Athens and Rome, were monarchies at their first commencement. The history of China is said to reach a period of antiquity very

remote; at the remotest period, monarchy was the form of government which prevailed in it.

But though monarchy is the most ancient form of government; monarchs were, at first, neither hereditary nor despotick. We have seen that Dejoces, the first monarch of Media, became a king by election. Crowns, in general, were originally elective. True, indeed, it is, that, from causes obvious and easy to be assigned, the office, which, at first, was elective, became afterwards hereditary.

The dominions of the first monarchs were far from being extensive. In the days of Abraham, there were five kings in the single Valley of Sodom. The kings defeated by Joshua in Palestine were thirty one in number. The different provinces, which, at present, compose the empire of China, formed anciently so many separate monarchies. "The ancient Britons," says Bacon in his Discourses on Government,[d] "had many chiefs in a little room; whom the Romans called kings, for the greater renown of their empire." For many ages, Greece was divided into a vast number of small and inconsiderable kingdoms.

The authority of those ancient monarchs was not more extensive than their dominions. It appears from many monuments, that, by the constitutions of the first kingdoms, the people had a great share in the government. Affairs of importance were debated and determined in the general assemblies of the nations.[e] "De majoribus omnes consultant," says Tacitus[f] of the ancient

[d] P. 1. [e] 1. Gog. Or. Laws. 15. [f] De mor. Germ. c. 11

The first kings were, indeed, properly no
judges, who had no power to inflict punish-
ir own authority, and without the consent of
Hence the poet Hesiod says, that the muses
the art of persuasion, that they may engage
to submit to their decisions, for which end
placed in that exalted station.[g] "Principes
gos vicosque reddunt," says Tacitus in the
now cited.[h]

pinion," says Cicero,[i] "it was not among
nly, as Herodotus informs us; but it was
wn ancestors likewise, that kings of good
re chosen, in order that the administration
ight be enjoyed. For when the poor were
y the rich, they fled for relief to some one,
in virtue, who would protect the weak from
nd would dispense equal law to the high and
If they could obtain this from the mouth of
d good man, they were satisfied; but, as they
disappointed in this reasonable demand, they
wards, recourse to general law, which spoke
ge to all."

ourse of things in other nations, was similar to
h took place in Media and in Rome. "At first,"
xcellent Hooker, "when some kind of regiment
approved; it may be, that nothing was, then,
ought upon for the manner of governing; but
ted to their wisdom and discretion, which were
till, by experience, they found this, for all parts,

[g] Gro. 70. n. 53. [h] De mor. Germ. c. 12.

[i] De off. l. 2. c. 12.

very inconvenient, so as the thing, which they had devised for a remedy, did but increase the sore, which it should have cured. They saw, that to live by one man's will, became the cause of all men's misery. This constrained them to come unto law, wherein all men might see their duties beforehand, and know the penalties of transgressing them."[j]

This progress of government and law, we find remarkably exemplified in the history of Greece. At first, all the Grecian cities were under the government of kings, not arbitrarily, but agreeably to the laws and customs of the country. He was esteemed the best king, who was the justest and strictest observer of the laws, and who never departed from the established customs of his kingdom. This explains the true meaning of Homer, (who painted to the life) when he denominated kings, "men, who distribute justice." These small monarchies, thus limited, subsisted for a long time, as, for instance, that of the Lacedemonians. But, afterwards, some kings began to abuse their power, and to govern according to their pleasure, rather than according to the laws. This the Greeks could not endure; and, therefore, abolished the monarchical form of government, and established other kinds of government in its place.

To find out the best kind of government has been long the celebrated problem in the political world. In order to furnish some imperfect materials for the solution of this very important inquiry, let us consider and investigate the qualities and principles, by which a good government ought to be characterized.

[j] Hooker. b. 1. p. 18.

Men, frail and imperfect as they are, must be the instruments, by which government is administered. But, in order to guard against the consequences of their frailties and imperfections, one effort, in the contrivance of the political system, is, to provide, that, for the offices and the departments of the state, the wisest and the best of her citizens be elected. A second effort is, to communicate to the operations of government as great a share as possible of the good, and as small a share as possible of the bad propensities of our nature. A third effort is, to increase, encourage, and strengthen those good propensities, and to lessen, discourage, and correct those bad ones. A fourth effort is, to introduce, into the very form of government, such particular checks and controls, as to make it advantageous even for bad men to act for the publick good. When these efforts are successful, and happily united; then is accomplished what we truly mean, when we speak of a government of laws, and not of men; then every man does homage to the laws; the very least as feeling their care; the greatest as not exempted from their power.

What are the qualities in government, necessary for producing laws, properly designed, properly framed, and properly enforced? Goodness should inspire and animate the intention: wisdom should direct and arrange the means: power should render the means efficacious, by carrying the laws vigorously into execution. The more all those qualities prevail in any government, the nearer does that government approach to its perfection. In some kinds of government, one of the qualities is eminent in undue proportion: in others, another: but the best are those, in which all the qualities are happily blended in their operation, and dif-

fuse, through the whole society, their mingled and tempered influence.

We have now taken a general view of government, and have traced the qualities, which should operate through the whole: let us descend to a more minute examination of its different parts: let us view the structure and properties of each, considered by itself; and also the mutual dependencies and controls, which each ought to possess, and to which each ought to be subject, when considered relatively to others.

The powers of government are usually, and with propriety, arranged under three great divisions; the legislative authority, the executive authority, and the judicial authority. Let us consider each, as its greatness deserves to be considered.

The first remark, which I shall make on the structure of the legislative power, is, that it ought to be *divided*. In support of this position, which is, indeed, one of the most important in both the theory and the practice of government, many arguments may be advanced. Let me introduce one, by the declaration of an admired judge, whose manly candour must charm every generous mind. "It is the glory and happiness of our excellent constitution, that, to prevent any injustice, no man is concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another court, to which he may resort for relief. For my part, I can say, that it is a consideration of great comfort to me, that, if I do err, my judgment is not conclusive to the party; but my mistake may be rectified, and so no injustice be done."[k] Is less skill re-

[k] Str. 565.

quired—should less caution be observed—in making laws, than in explaining them? Are mistakes less likely to happen—are they less dangerous—is it less necessary to prevent or rectify them, in the former case, than in the latter? Which is most necessary? to preserve the streams, or to preserve the fountain from becoming turbid?

But the danger arising from mistakes and inaccuracies is not the only nor the greatest one, to be apprehended from a single body possessed of legislative power. It is impossible to restrain it in its operations. No other power in government can arrest the proceedings of that which makes the laws. Let us suppose, that this single body, in a lucky moment, should pass a law to restrain itself: in the next moment, an unlucky one, it might repeal the restraining law. Any mounds, which it might raise to confine itself, would still be within the sphere of its own motion; and whatever force should impel it, would necessarily impel those mounds along with it. To stop and to check, as well as to produce motion in this political globe, we must possess—what Archimedes wanted—another globe to stand upon.

A single legislature is calculated to unite in it all the pernicious qualities of the different extremes of bad government. It produces general weakness, inactivity, and confusion; and these are intermixed with sudden and violent fits of despotism, injustice, and cruelty.

But I will take the subject a little deeper: it is of the utmost consequence that it be fully discussed. In private life, how often and how fatally are we seduced, by our passions and by our prejudices, from those paths,

which would lead us to our true interests? But are passions and prejudices less frequently to be found in publick bodies, than in individuals? Are they less powerful? Do they not become inflamed by mutual imitation and example? Will they not, if unrestrained, produce the most mischievous effects? Ye, who are versed in the science of human nature—ye, who have viewed it in the faithful mirrour of history—tell us, for you know, what answer should be given to these questions. Cannot you point out instances, in which the people have become the miserable victims of passions, operating upon their government without restraint? Cannot you point out other instances, in which the violence of one part of the government has been happily controlled by the constitutional interposition of another part?

There is not in the whole science of politicks a more solid or a more important maxim than this—that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles. When a single legislature is determined to depart from the principles of the constitution—and its incontrollable power may prompt the determination—there is no constitutional authority to arrest its progress. It may proceed, by long and hasty strides, in violating the constitution, till nothing but a revolution can stop its career. Far different will the case be, when the legislature consists of two branches. If one of them should depart, or attempt to depart from the principles of the constitution; it will be drawn back by the other. The very apprehension of the event will prevent the departure or the attempt.

In all the most celebrated governments both of ancient and of modern times, we find the legislatures composed

of distinct bodies. Such was that formed at Athens by Solon. Such was that instituted at Sparta by Lycurgus. Such was that, which so long flourished at Rome. In our sister states, their legislatures consist of distinct bodies of men. Similar, upon this subject, is the constitution of the United States. And we can now happily say, that Pennsylvania no longer exhibits an instance to the contrary—that she no longer holds out to view a beacon to be avoided, instead of an example deserving imitation.

Thus much I have thought it necessary to say concerning that power of government, which is intrusted with the making of the laws. Let us next consider those powers, which are intrusted with their execution, and with the administration of justice under their authority. Wise and good laws are indeed essential; but though they are essential, they are so only as means. If we stop here, all that we have done is nugatory and abortive. The end is still unattained; and that can be attained only when the laws are vigorously and steadily executed; and when the administration of justice under them is unbiassed and enlightened.

Indeed, if I mistake not, an inferiour proportion of attention, in this and in most of our sister states, has been employed about these important parts of the political system. Laws have abounded: their multiplicity has been often a grievance: but their weak and irregular execution, and the unwise and unstable administration of justice, have been subjects of general and well grounded complaint.

Habits contracted before the late revolution of the United States, operate, in the same manner, since that

time, though very material alterations may have taken place in the objects of their operations.

Before that period, the executive and the judicial powers of government were placed neither in the people, nor in those, who professed to receive them under the authority of the people. They were derived from a different and a foreign source: they were regulated by foreign maxims: they were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust? Need we be surprised, that every occasion was seized for lessening their influence, and weakening their energy? On the other hand, our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes. Every power, which could be placed in them, was thought to be safely placed: every extension of that power was considered as an extension of our own security.

At the revolution, the same fond predilection, and the same jealous dislike, existed and prevailed. The executive and the judicial as well as the legislative authority was now the child of the people; but, to the two former, the people behaved like stepmothers. The legislature was still discriminated by excessive partiality; and into its lap, every good and precious gift was profusely thrown.

Even at this time, people can scarcely devest themselves of those opposite prepossessions: they still hold, when, perhaps, they perceive it not, the language, which expresses them. In observations on this subject, we hear the legislature mentioned as the *people's represent-*

atives. The distinction, intimated by, concealed implication, though probably, not avowed upon reflection, is, that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear.

But it is high time that we should chastise our prejudices; and that we should look upon the different parts of government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them. The character, and interest, and glory of the two former are as intimately and as necessarily connected with the happiness and prosperity of the people, as the character, and interest, and glory of the latter are. Besides; the execution of the law, and the administration of justice under the law, bring it home to the fortunes, and farms, and houses, and business of the people. Ought the executive or the judicial magistrates, then, to be considered as foreigners? ought they to be treated with a chilling indifference?

Having shown, that, on the principles of our new system, jealousies and prejudices concerning the executive and judicial departments ought to be discarded; let us now consider, in what manner those departments should be formed and constituted. We begin with the executive department.

The executive as well as the legislative power ought to be restrained. But there is a remarkable contrast

between the proper modes of restraining them. The legislature, in order to be restrained, must be *divided*. The executive power, in order to be restrained, should be *one*. Unity in this department is at once a proof and an ingredient of safety and of energy in the operations of government.

The restraints on the legislative authority must, from its nature, be chiefly internal; that is, they must proceed from some part or division of itself. But the restraints on the executive power are external. These restraints are applied with greatest certainty, and with greatest efficacy, when the object of restraint is clearly ascertained. This is best done, when one object only, distinguished and responsible, is conspicuously held up to the view and examination of the publick.

In planning, forming, and arranging laws, deliberation is always becoming, and always useful. But in the active scenes of government, there are emergencies, in which the man, as, in other cases, the woman, who deliberates, is lost. Secrecy may be equally necessary as despatch. But, can either secrecy or despatch be expected, when, to every enterprise, and to every step in the progress of every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views, of discordant tempers, and of discordant interests, are indispensably necessary? How much time will be consumed! and when it is consumed; how little business will be done! When the time is elapsed; when the business is unfinished; when the state is in distress, perhaps, on the verge of destruction; on whom shall we fix the blame? whom shall we select as the object of punishment?

Ruinous dissensions are not the only inconveniences resulting from a numerous executive body: it is equally liable to pernicious and intriguing combinations. When the first take place, the publick business is not done at all: when the last take place, it is done for mean or malicious purposes.

The appointment to offices is an important part of the executive authority. Much of the ease, much of the reputation, much of the energy, and much of the safety of the nation depends on judicious and impartial appointments. But are impartiality and fine discernment likely to predominate in a numerous executive body? In proportion to their own number, will be the number of their friends, favourites, and dependents. An office is to be filled. A person nearly connected, by some of the foregoing ties, with one of those who are to vote in filling it, is named as a candidate. His patron is under no necessity to take any part, particularly responsible, in his appointment. He may appear even cold and indifferent on the occasion. But he possesses an advantage, the value of which is well understood in bodies of this kind. Every member, who gives, on his account, a vote for his friend, will expect the return of a similar favour on the first convenient opportunity. In this manner, a reciprocal intercourse of partiality, of interestedness, of favouritism, perhaps of venality, is established; and, in no particular instance, is there a practicability of tracing the poison to its source. Ignorant, vicious, and prostituted characters are introduced into office; and some of those, who voted, and procured others to vote for them, are the first and loudest in expressing their astonishment, that the door of admission was ever opened to men of their infamous description. The suffering people are thus

wounded and buffeted, like Homer's Ajax, in the dark; and have not even the melancholy satisfaction of knowing by whom the blows are given. Those who possess talents and virtues, which would reflect honour on office, will be reluctant to appear as candidates for appointments. If they should be brought into view; what weight will virtue, merit, and talents for office have, in a balance held and poized by partiality, intrigue, and chicane?

The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible. He should be alike unfettered and unsheltered by counsellors. No constitutional stalking horse should be provided for him to conceal his turnings and windings, when they are too dark and too crooked to be exposed to publick view. Instead of the dishonourable intercourse, which I have already mentioned, an intercourse of a very different kind should be established—an intercourse of integrity and discernment on the part of the magistrate who appoints, and of gratitude and confidence on the part of the people, who will receive the benefit from his appointments. Appointments made and sanctioned in this highly respectable manner, will, like a fragrant and beneficent atmosphere, diffuse sweetness and gladness around those, to whom they are given. Modest merit will be beckoned to, in order to encourage her to come forward. Barefaced impudence and unprincipled intrigue will receive repulse and disappointment, deservedly their portion.

If a contrary conduct should unfortunately be observed—and, unfortunately, a contrary conduct will be sometimes observed—it will be known by the citizens, whose conduct it is: and, if they are not seized with the

only distemper incurable in a free government—the distemper of being wanting to themselves—they will, at the next general election, take effectual care, that the person, who has once shamefully abused their generous and unsuspecting confidence, shall not have it in his power to insult and injure them a second time, by the repetition of such an ungrateful return.

The observations, which I have made on the appointments to offices, will apply, with little variation, to the other powers and duties of the executive department.

When more than one person are engaged in the same enterprise, a difference of opinion, concerning the object or the means, is no improbable contingency. When the difference takes place among those of equal authority, where is the umpire to decide? A prevailing and undecided difference in sentiment, is the inauspicious parent of bitter and determined opposition in conduct. In business, which is merely deliberative, these differences may be concluded by a resolution or a vote: for, when a vote is taken, the majority is ascertained, and the business is done. But, in publick enterprises, the case is far otherwise. To the success of the enterprise, the zealous cooperation of the dissenting minority is no less indispensable, than that of the consenting majority. Is such cooperation to be expected? Would it be safe to calculate the motions of government upon an expectation, indeed, so extremely improbable? If we build on such a sandy foundation, will not the superstructure tumble in pieces, and bury, under its ruins, the dearest interests of the state?

If, on the other hand, the executive power of government is placed in the hands of one person, who is

to direct all the subordinate officers of that department; is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency, and energy? These mark the proceedings of one man; at least, of one man, fit to be intrusted with the management of important publick affairs. May we not indulge, at least in imagination, the pleasing prospect, that this one man —the choice of those who are deeply interested in a proper choice—will be a man distinguished by his abilities? Will not those abilities pervade every part of his administration? Will they not diffuse their animating influence over the most distant corners of the nation?—May we not further indulge the pleased imagination in the agreeable prospect—in one instance, at least, it is realized by experience—that the publick choice will fall upon a man, in whom distinguished abilities will be joined and sublimed by distinguished virtues—on a man, who, on the necessary foundation of a private character, decent, respected, and dignified, will build all the great, and honest, and candid qualities, from which an elevated station derives its most beautiful lustre, and publick life its most splendid embellishments?

If these pleasing prospects should unhappily be blasted by a preposterous choice, and by the preposterous conduct of the magistrate chosen; still, at the next election, an effectual remedy can be applied to the mischief: and this remedy will be applied effectually, unless, as has been already intimated, the citizens should be wanting to themselves. For a people wanting to themselves, there is indeed no remedy in the political dispensary. From their power there is no appeal: to their errour there is no superiour principle of correction.

The third great division of the powers of government is the judicial authority. It is sometimes considered as a branch of the executive power; but inaccurately. When the decisions of courts of justice are made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial. The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.

The very existence of a dispute is presumptive evidence, that the application is not altogether without intricacy or difficulty. When intricacy or difficulty takes place in the application, it cannot be properly made without the possession of skill in the science of jurisprudence, and the most unbiassed behaviour in the exercise of that skill. Clear heads, therefore, and honest hearts are essential to good judges.

As all controversies in the community respecting life, liberty, reputation, and property, must be influenced by their judgments; and as their judgments ought to be calculated not only to do justice, but also to give general satisfaction, to inspire general confidence, and to take even from disappointed suiters—for in every cause disappointment must fall on one side—the slightest pretence of complaint;[1] they ought to be placed in such a situation, as not only to be, but likewise to appear superiour to every extrinsick circumstance, which can be

[1] Etiam quos contra statuit, æquos placatosque demisit; says Cicero of Brutus.

supposed to have the smallest operation upon their understandings or their inclinations. In their salaries, and in their offices, they ought to be completely independent: in other words, they should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behaviour and its consequences.

"We are," says a very sensible writer on political subjects, "to look upon all the vast apparatus of government as having ultimately no other object or purpose, but the distribution of justice. All men are sensible of the necessity of justice to maintain peace and order; and all men are sensible of the necessity of peace and order for the maintenance of society."[m] "The pure, and wise, and equal administration of the laws," says Mr. Paley,[n] "forms the first end and blessing of social union." But how can society be maintained—how can a state expect to enjoy peace and order, unless the administration of justice is able and impartial? Can such an administration be expected, unless the judges can maintain dignified and independent characters? Can dignity and independence be expected from judges, who are liable to be tossed about by every veering gale of politicks, and who can be secured from destruction, only by dexterously swimming along with every successive tide of party? Is there not reason to fear, that in such a situation, the decisions of courts would cease to be the voice of law and justice, and would become the echo of faction and violence?

This is a subject, which most intimately concerns every one, who sets the least value upon his own safety,

[m] 1. Hume's Ess. 35. [n] 2. Paley. 305.

or that of his posterity. Our fortunes, our lives, our reputations, and our liberties are all liable to be affected by the judgments of the courts. How distressing and melancholy must the reflection be, that, while judges hold their salaries only at pleasure, and their commissions only for the term of a few years, our liberties, our fortunes, our reputations, and our lives may be sacrificed to a party, though we have done nothing to forfeit them to the law.

Though the foregoing great powers—legislative, executive, and judicial—are all necessary to a good government; yet it is of the last importance, that each of them be preserved distinct, and unmingled, in the exercise of its separate powers, with either or with both of the others. Here every degree of confusion in the plan will produce a corresponding degree of interference, opposition, combination, or perplexity in its execution.

Let us suppose the legislative and executive powers united in the same person: can liberty or security be expected? No. In the character of executive magistrate, he receives all the power, which, in the character of legislator, he thinks proper to give. May he not, then—and, if he may, will he not then—such is the undefined and undefinable charm of power—enact tyrannical laws to furnish himself with an opportunity of executing them in a tyrannical manner? Liberty and security in government depend not on the limits, which the rulers may please to assign to the exercise of their own powers, but on the boundaries, within which their powers are circumscribed by the constitution. He who is continually exposed to the lash of oppression, as well as he who is immediately under it, cannot be denominated free.

Let us suppose the legislative and judicial powers united: what would be the consequence? The lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private opinions, and would not be governed by any fixed or known principles of law. For though, as judges, they might be bound to observe those principles; yet, Proteus-like, they might immediately assume the form of legislators; and, in that shape, they might escape from every fetter and obligation of law.

Let us suppose a union of the executive and judicial powers: this union might soon be an overbalance for the legislative authority; or, if that expression is too strong, it might certainly prevent or destroy the proper and legitimate influences of that authority. The laws might be eluded or perverted; and the execution of them might become, in the hands of the magistrate or his minions, an engine of tyranny and injustice. Where and how is redress to be obtained? From the legislature? They make new laws to correct the mischief: but these new laws are to be executed by the same persons, and will be executed in the same manner as the former. Will redress be found in the courts of justice? In those courts, the very persons who were guilty of the oppression in their administration, sit as judges, to give a sanction to that oppression by their decrees. Nothing is more to be dreaded than maxims of law and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds.

Let us suppose, in the last place, all the three powers of government to be united in the same man or body of men: miserable indeed would this case be! This extent of misery, however, at least in Europe, is seldom experienced; because the power of judging is generally exercised by a separate department. But in Turkey, where all the three powers are joined in the Sultan's person, his slaves are crushed under the insupportable burthen of oppression and tyranny. In some of the governments of Italy, these three powers are also united. In such there is less liberty than in the European monarchies: and their governments are obliged to have recourse to as violent measures to support themselves, as even that of the Turks. At Venice, where an aristocracy, jealous and tyrannical, absorbs every power, behold the state inquisitors, and the lion's mouth, at all times open for the secret accusations of spies and informers. In what a situation must the wretched subjects be under such a government, all the powers of which are leagued, in awful combination, against the peace and tranquillity of their minds!

But further; each of the great powers of government should be independent as well as distinct. When we say this; it is necessary—since the subject is of primary consequence in the science of government—that our meaning be fully understood, and accurately defined. For this position, like every other, has its limitations; and it is important to ascertain them.

The independency of each power consists in this, that its proceedings, and the motives, views, and principles, which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the

other two powers. But further than this, the independency of each power ought not to extend. Its proceedings should be formed without restraint, but, when they are once formed, they should be subject to control.

We are now led to discover, that between these three great powers of government, there ought to be a mutual dependency, as well as a mutual independency. We have described their independency: let us now describe their dependency. It consists in this, that the proceedings of each, when they come forth into action and are ready to affect the whole, are liable to be examined and controlled by one or both of the others.

So far are these different qualities of mutual dependency and mutual independency from opposing or destroying each other, that, without one, the other could not exist. Whenever the independency of one, or more than one, is lost, the mutual dependency of the others is, that moment, lost likewise: it is changed into a constant dependency of that one part on two; or, as the case may be, of those two parts on one.

An example may illustrate the foregoing propositions. They cannot be explained too fully. The congress is intrusted with the legislative power of the United States. In preparing bills, in debating them, in passing them, in refusing to pass them, their resolutions and proceedings should be uncontrolled and uninfluenced. Here is the independency of the legislative power. But after the proceedings of the legislature are finished, so far as they depend on it, they are sent to be examined, and are subjected to a given degree of control by the head of the executive department. Here is the dependency of

the legislative power. It is subject also to another given degree of control by the judiciary department, whenever the laws, though in fact passed, are found to be contradictory to the constitution.

The salutary consequence of the mutual dependency of the great powers of government is, that if one part should, at any time, usurp more power than the constitution gives, or make an improper use of its constitutional power, one or both of the other parts may correct the abuse, or may check the usurpation.

The total disjunction of these powers would, in the end, produce that very union, against which it seems to provide. The legislature would soon become tyrannical, and would assume to itself the rights of the executive and judicial powers.

The important conclusion to be drawn from the premises, which we have established, is, that, in government, the perfection of the whole depends on the balance of the parts, and the balance of the parts consists in the independent exercise of their separate powers, and, when their powers are separately exercised, then in their mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest.

It might be supposed, that these powers, thus mutually checked and controlled, would remain in a state of inaction. But there is a necessity for movement in human affairs; and these powers are forced to move, though still to move in concert. They move, indeed, in a line of direction somewhat different from that, which each,

acting by itself, would have taken; but, at the same time, in a line partaking of the natural direction of each, and formed out of the natural directions of the whole—the true line of publick liberty and happiness.

The works of human invention are progressive; and frequently are not completed, till after a slow and lengthened series of gradual improvements, remotely distant from one another both in place and in time. To the theory and practice of government, this observation is applicable with peculiar justness and peculiar force. In this science, few opportunities have been given to the human mind of indulging itself in easy and unrestrained investigation: still fewer opportunities have offered of verifying and correcting investigation by experiment. An age—a succession of ages—elapses, before a system of jurisprudence rises from its first rude beginnings. When we have made a little progress, and look forward; a few eminences in prospect are fondly supposed to form the greatest elevation, which we shall be obliged to ascend. But these, once gained, disclose, behind them, new and superiour degrees of excellence, yet unattained. In beginning and continuing the pursuit of the arduous paths, through which this science leads us, we may well adopt the language of the philosophick poet;

> So pleas'd, at first, the tow'ring Alps we try,
> Mount o'er the vales, and seem to tread the sky.
> Th' eternal snows appear already past,
> And the first clouds and mountains seem the last:
> But these attain'd, we tremble to survey
> The growing labours of the lengthen'd way;
> Th' increasing prospect tires our wand'ring eyes,
> Hills peep o'er hills, and Alps on Alps arise!

If the discoveries in government are difficult and slow, how much more arduous must it be to obtain, in practice, the advantage of those discoveries, after they have been made! Of some governments, the foundation has been laid in necessity; of others, in fraud; of others, in force; of how few, in deliberate and discerning choice! If, in their commencements, they have been so unpropitious to the principles of freedom, and to the means of happiness; shall we wonder, that, in their progress, they have been equally unfavourable to advances in virtue and excellence.

Let us ransack the records of history: in all our researches, how few fair instances shall we be able to find, in which a government has been formed, whose end has been the happiness of those, for whom it was designed! how few fair instances shall we find, in which such a government has been administered with a steady direction towards that end!

To all these circumstances, we must add others, which show still further the numerous and the strong obstacles that lie in the way of improvement in jurisprudence. Government, founded in improper principles, and directed to improper objects, has a natural and powerful bias, both upon those who rule, and upon those who are ruled. Its bias upon the first will occasion no surprise: its bias upon the second, however surprising, is not, perhaps, less efficacious. How often have the vassals of absolute monarchy conceived their own dignity and happiness to be involved in the glory of their monarch! How often have they, in pursuit of projects for the accomplishment of his capricious desires, discovered a degree of courage and enthusiasm, worthy of a

nobler object and a better cause! If such is the effect produced upon their conduct; will an inferiour effect be produced on their sentiments? Hence the principles of despotism become the principles of a whole nation, blinded and degraded by its pernicious influence.

But let us suppose that the light of liberty, at last, breaks in upon them; how slow must its progress; how feeble, for a long time, must its energy be! Power, splendour, influence, prejudice, fashion, all stand arranged in opposition to its operations.

Let us enlarge the sphere of our conjecture further, and suppose, that, notwithstanding all the efforts of opposition, the principles and doctrines of freedom are successfully propagated and established; yet how many and how formidable are the barriers, that remain to be surmounted, before those principles and doctrines can be carried successfully into practice? The friends of freedom, we shall suppose, are unanimous in their sentiments; does the same unanimity prevail with regard to their measures? does it prevail still farther with regard to the time and manner of pursuing them? In all these particulars, is unanimity attended with discretion, on one hand, and with decision, on the other? A failure in one circumstance, is a failure in all. Have not centuries passed without a single auspicious juncture, in which all, conjoined and cooperating, could have succeeded?

When we revolve, when we compare, when we combine the remarks, which we have been now making; when we take a slight glance of others, which might be offered; we shall be at no loss to account for the slow

and small progress, which, after a lapse of ages, has been made in the science and practice of government.

Among the ancient political writers, no more than three regular forms of government were known and allowed. The first is that, in which the supreme power is lodged in the hands of a single person. This they denominated a monarchy. The second is that, in which the supreme power is vested in a select assembly, the members of which either fill up by election the vacancies of their own body, or succeed to their places by inheritance, property, tenure of lands, or in respect of some personal right or qualification. To this they gave the appellation of aristocracy. The third is that, in which the supreme power remains with the people at large, and is exercised either collectively, or by representation. On this they bestowed the name of democracy.

To each of these simple forms, conveniences and inconveniences, good and bad qualities are attached. In a democracy, publick virtue and purity of intention are likely to be found; but its counsels are often improvident, and the execution of them as frequently weak. In an aristocracy, we expect wisdom formed by education and experience; but, on the other hand, we may expect jealousies and dissensions among the nobles, and oppression of the lower orders. In a monarchy, there are strength and vigour; but there is danger, that they will not be employed for the happiness and prosperity of the state. A democracy is best calculated to direct the end of the laws; an aristocracy, to direct the means of attaining that end; a monarchy, to carry those means into execution.

The ancients considered all other species of governments as either corruptions of these three simple forms, or as reducible to some one of them. They had no idea of combining all the three together, and of uniting the advantages resulting from each. Cicero,[o] indeed, seems to have indulged a fond speculative opinion, that a government formed of the three kinds, properly blended and tempered, would, of all, be the best constituted. But this opinion was treated as visionary by his countrymen; and by Tacitus,[p] one of the wisest of them.

The example of Great Britain, however, has evinced that the sentiments of Cicero merited a very different reception; and that, if they did not point to the highest degree of excellence, they pointed, at least, to substantial improvement.

The government of that nation is composed of monarchical, aristocratical, and democratical parts. It possesses—we freely and with pleasure acknowledge—it possesses advantages over all that have preceded it: in dignity and in duration, in the maintenance of liberty, both publick and private, it has stood preeminent. But has it reached the lofty summit of perfection? In the race of excellence, has it gained a goal, which cannot be surpassed? Is it entitled, as, in less enlightened times, the columns of Hercules were thought to be, to the proud inscription of "ne plus ultra?"

For the western world, new and rich discoveries in jurisprudence have been reserved. We have found that, in order to arrive, in this first of human sciences, at a

[o] Frag. de rep. l. 2. [p] Ann. l. 4.

point of perfection hitherto unattained, it is not necessary to intermix the different species of government. We have discovered, that one of them—the best and purest—that, in which the supreme power remains with the people at large, is capable of being formed, arranged, proportioned, and organized in such a manner, as to exclude the inconveniences, and to secure the advantages of all the three. On the basis of goodness, we erect the pillars of wisdom and strength.

The formation and establishment of constitutions are an immense practical improvement, introduced by the Americans into the science of government and jurisprudence. By the invigorating and overruling energy of a constitution, the force and direction of the government are preserved and regulated; and its movements are rendered uniform, strong, and safe.

It is proper that the nature and distinguishing characteristicks of a constitution should be clearly stated and explained. The sentiments and expressions, even of celebrated writers upon this subject, are uncommonly inaccurate and obscure.

By the term constitution, I mean that supreme law, made or ratified by those in whom the sovereign power of the state resides, which prescribes the manner, according to which the state wills that the government should be instituted and administered. From this constitution the government derives its power: by this constitution the power of government must be directed and controlled: of this constitution no alteration can be made by the government; because such an alteration would destroy the foundation of its own authority.

As to the people, however, in whom the sovereign power resides, the case is widely different, and stands upon widely different principles. From their authority the constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it? A majority of the society is sufficient for this purpose; and if there be nothing in the change, which can be considered as contrary to the act of original association, or to the intention of those who united under it; all are bound to conform to the resolution of the majority. If the act of original association be infringed, or the intention of those who united under it be violated; the minority are still obliged to suffer the majority to do as they think proper; but are not obliged to submit to the new government. They have a right to retire, to sell their lands, and to carry off their effects.

It may, perhaps, be asked—why is so much pains taken to prove and illustrate a principle, which, when detached from adventitious circumstances, and exhibited in its undisguised appearance, is so obvious, that few will be found disposed, in direct terms, to refuse their assent to its truth? Has it been denied, that those, who have a right to make, have a right to alter what they have made?

In England it has been denied: the successour of Sir William Blackstone in the Vinerian chair expresses himself upon this subject in the following manner. "However the historical fact may be of a social contract, government ought to be, and is generally considered as

founded on consent, tacit or express, on a real or *quasi* compact. This theory is a material basis of political rights; and, as a theoretical point, is not difficult to be maintained. For what gives any legislature a right to act, where no express consent can be shown? what, but immemorial usage? and what is the intrinsick force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent? Not," adds he, "that such consent is subsequently revocable, at the will even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superiour to the rulers thereof, after their establishment."[q] "I am far," says he, in another place, "from maintaining, that any consent, tacit or express, is essential to induce the duty of subjection from individuals born under an established government."[r] The evident consequence of these positions is, that though the great and animating principle of consent is considered as necessary to the first formation of government, yet it is by no means necessary in the successive periods of its establishment. The theory is admitted; but the continued right to practise according to that theory is denied. In other words, an established government is treated as superiour to those, or, at least, to others possessing all the rights of those, who originally formed its establishment.

In America, indeed, the doctrine, which I have taken some pains to prove and illustrate, has not been denied, in words; yet unwearied attempts have, on more occasions than one, been made to elude its operation, and to destroy its force.

[q] El. Jur. (4to.) 22. [r] Id. 23.

Besides; it is of high import, that the great principles of society and government should not only be known and recognised, but also that they should be so maturely considered and estimated, as, at last, to make a practical impression, deep and habitual, upon the publick mind. A proper regard to the original and inherent and continued power of the society to change its constitution, will prevent mistakes and mischiefs of very different kinds. It will prevent giddy inconstancy: it will prevent unthinking rashness: it will prevent unmanly languor.

Some have appeared apprehensive, that the introduction of this principle into our political creed would open the door for the admission of levity and unsteadiness in all our political establishments. The very reverse will be its effect. Let the uninterrupted power to change be admitted and fully understood, and the exercise of it will not be lightly or wantonly assumed. There is a *vis inertiæ* in publick bodies as well as in matter; and, if left to their natural propensities, they will not be moved without a proportioned propelling cause. If, indeed, the prevailing opinion should be, that the society had not the regular power of altering, on every proper opportunity, its political institutions; an occasion, favourable in appearance, but deceptive in reality, might be suddenly fixed on, as a season for action. It might be allowed not to be, in every respect, unexceptionable; but when, it would be urged, will another, less exceptionable, present itself? The consequence would be, that the juncture, however unpropitious, would be seized with premature and improvident zeal, in order to accomplish the meditated change. Disappointments, arising from the want of due preparations, would take place; disasters, very prejudicial to the publick and to individuals, would be pro-

duced; and the enterprise would prove abortive, merely because it was pursued at an unfit time, and under unfit circumstances.

On the other hand, how often and how long has degrading despotism reigned triumphant, because the enfeebled and desponding sufferers under it have not known, or, having once known, have, at last, forgotten, that they retain, during every moment of their slavery, the right of rescuing themselves from the proud and bloated authors and instruments of their oppression! Hesitation about the right will be attended with a corresponding hesitation about the expediency of redress. A revolution, surrounded, in prospect, so thickly with doubts, uncertainties, and apprehensions, will wear a gloomy and formidable appearance; and the miserable patients of tyranny will languish out their lives in excruciating and accumulated distress, merely because they will not undergo one short operation, which would not be more painful than their disease, and which would forever deliver them from all its ills and consequences.

The importance of a good constitution will, on reflection and examination, be easily conceived, deeply felt, and readily acknowledged. On the constitution will depend the beneficence, the wisdom, and the energy, or the injustice, the folly, and the weakness of the government and laws. On the good or bad qualities of the government and laws, will depend the prosperity or the decline of the state. On the same good or bad qualities will depend, on one hand, the excellence and happiness, and, on the other, the depravity and infelicity of the citizens.

A state well constituted, well proportioned, and well conducted feels her own importance, her own power, and her own vigour. Her importance, her power, and her vigour are seen by others, as well as felt by herself. What are the consequences? Internal firmness; external respect: the confidence of her citizens; the esteem of foreigners. What, again, are the consequences of these? Peace; and dignity and security in the enjoyment of peace.

Let us reverse the scene—let us view a state ill constructed, ill proportioned, and ill directed. She may exhaust every stratagem, and employ every art, to cover her weakness and her defects: but can she destroy her own knowledge of them? will her arts and stratagems be successful in concealing them from others? The very pains taken to conceal, will facilitate the discovery, and enhance its importance. Her imperfections, half seen behind the veil drawn over them, will appear greater, than if fully exposed. What will be the result of this situation, thus felt and thus viewed? Fluctuation in her councils; irresolution in her measures; pusillanimity in her attempts to execute them: the distrust and alarm of her own citizens: the contempt, and the unfriendly designs produced by the contempt, of the nations around her: the evils attending war, or the evils, little inferiour, attending a nation, which is equally incapable of securing peace and of repelling hostilities.

The influence of a good or bad constitution is not less powerful on the citizens, considered as individuals, than on the community, considered as a body politick. It is only under a good constitution that liberty—the precious gift of heaven—can be enjoyed and be secure.

This exalting quality comprehends, among other things, the manly and generous exercise of our powers; and includes, as its most delicious ingredient, the happy consciousness of being free. What energetick, what delightful sensations must this enlivening principle diffuse over the whole man! His mind is roused and elevated: his heart is rectified and enlarged: dignity appears in his countenance, and animation in his every gesture and word. He knows that if he is innocent and upright, the laws and constitution of his country will ensure him protection. He trusts, that, if to innocence and integrity he adds faithful and meritorious services, his country, in addition to protection, will confer upon him honourable testimonies of her esteem. Hence he derives a cheerful and habitual confidence, this pervades and invigorates his conduct, and spreads a noble air over every part of his character. Hence, too, he is inspired with ardent affection for the publick: this stimulates and refines his strongest patriotick exertions. His heart, his head, his hands, his tongue, his pen, his fortune; all he is, and all he has, are devoted to his country's cause, and to his country's call.

A person of a very different description appears in view—pale, trembling, emaciated, faltering in his steps, not daring to look upwards, but, with marked anxiety, rolling his eager eyes on every side. Who is he? He is the slave of a bad constitution and a tyrannical government. He is afraid to act, or speak, or look. He knows that his actions and his words, however guarded, may be construed to be criminal: he knows that even his looks and countenance may be considered as the signs and evidences of treacherous thoughts and treasonable conspiracies; and he knows that the suspicion of his masters,

upon any of these points, may be fatal: for he knows, that he is at the mercy of those, who, upon the slightest suspicion, may seize or hang him—who may do whatever they please with him, and with all those who are dear to him. What effects must this man's situation produce upon his mind and temper? Can his views be great or exalted? No. Such views, instead of being encouraged, would give offence; and he is well aware what would follow. Can openness and candour beam from his soul? No. Such light would be hateful to his masters; it must be extinguished. Can he feel affection for his country, its constitution, or its government? No. His country is his prison; its constitution is his curse; and its government is a rod of oppression, held continually over his head. What must this man be? He must be abject, fawning, dastardly, selfish, disingenuous, deceitful, cunning, base—but why proceed in the disgusting detail? He must receive the stamp of servility fully impressed on his person, on his mind, and on his manners.

Such are the influences of a constitution, good or bad, upon the political body: such are its influences upon the members, of which that body is composed. Surely, then, the first consideration of a state, and its most important duty, is to form that constitution, which will be best in itself; and best adapted to the genius, and character, and manners of her citizens. Such a constitution will be the basis of her preservation, her happiness, and her perfection.

CHAPTER XI.

COMPARISON OF THE CONSTITUTION OF THE UNITED STATES, WITH THAT OF GREAT BRITAIN.

THE British constitution has been celebrated in the most sublime and in the most elaborate strains by poets, by orators, by lawyers, and by statesmen. "As for us Britons," says the elegant Shaftesbury, comparing them, in the spirit of a fond and a just preference, with many other nations, "as for us Britons, thank heaven, we have a better sense of government, delivered to us from our ancestors. We have a notion of a publick, and a constitution; how a legislative and how an executive is modelled. We understand weight and measure in this kind; and can reason justly on the balance of power and property. The maxims we draw from hence, are as evident as those in mathematicks. Our increasing knowledge shows us every day, more and more, what common sense is in politicks."[a]

[a] 1. Shaft. 108.

My Lord Bolingbroke,[b] in his masterly and animated style, represents this constitution as "a noble fabrick, the pride of Britain, the envy of her neighbours, raised by the labour of so many centuries, repaired at the expense of so many millions, and cemented by such a profusion of blood—a fabrick, which has resisted the efforts of so many races of giants."

You will be surprised on being told, that, if the nature and characteristick qualities, which I have described, are the true nature and characteristick qualities of a constitution; no such thing as a constitution, properly so called, is known in Great Britain. What is known, in that kingdom, under that name, instead of being the controller and the guide, is the creature and the dependent of the legislative power. The supreme power of the people is a doctrine unknown and unacknowledged in the British system of government. The omnipotent authority of parliament is the dernier resort, to which recourse is had in times and in doctrines of uncommon difficulty and importance. The natural, the inherent, and the predominating rights of the citizens are considered as so dangerous and so desperate a resource, as to be inconsistent with the arrangements of any government, which does or can exist.

The order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are masters of the government: there, the government is master of the people.

That, on this very interesting subject of contrast, you may be enabled to judge for yourselves, I shall lay

[b] Diss. on Part. 1st. 10. p. 151. 152.

before you some passages from British writers of high reputation. From those passages, you can draw your own inferences.

"Most of those," says Mr. Paley, "who treat of the British constitution, consider it as a scheme of government formally planned and contrived by our ancestors, in some certain era of our national history; and as set up in pursuance of such regular plan and design. Something of this sort is secretly supposed, or referred to, in the expressions of those, who speak of the principles of the constitution, of bringing back the constitution to its first principles, of restoring it to its original purity, or primitive model. Now this appears to me an erroneous conception of the subject. No such plan was ever formed; consequently no such first principles, original model, or standard exist.

"The constitution is one principal division, head, section, or title of the code of publick laws, distinguished from the rest only by the particular nature, or superiour importance of the subject, of which it treats. Therefore the terms *constitutional* and *unconstitutional*, mean *legal* and *illegal*. The distinction and the ideas, which these terms denote, are founded in the same authority with the law of the land upon any other subject; and to be ascertained by the same inquiries. The system of English jurisprudence is made up of acts of parliament, of decisions of courts of law, and of immemorial usages; consequently, these are the principles of which the constitution itself consists; the sources, from which all our knowledge of its nature and limitations is to be deduced, and the authorities, to which all appeal ought to be made, and by which every constitutional doubt or ques-

tion can alone be decided. This plain and intelligible definition is the more necessary to be preserved in our thoughts, as some writers upon the subject absurdly confound what is constitutional with what is expedient; pronouncing forthwith a measure to be unconstitutional, which they adjudge in any respect to be detrimental or dangerous; whilst others again ascribe a kind of transcendent authority, or mysterious sanctity to the constitution, as if it was founded in some higher original, than that, which gives force and obligation to the ordinary laws and statutes of the realm, or were inviolable on any other account than its intrinsick utility.

"An act of parliament, in England, can never be unconstitutional, in the strict and proper acceptation of the term: in a lower sense it may; viz. when it militates with the spirit, contradicts the analogy, or defeats the provision of other laws, made to regulate the form of government. Even that flagitious abuse of their trust, by which a parliament of Henry the eighth conferred upon the king's proclamation the authority of law, was unconstitutional only in this latter sense."[a]

Sir William Blackstone uses the term, constitution, as commensurate with the law of England. "Of a constitution," says he, "so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due. It hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the har-

[a] 2. Paley. 203. 205.

monious concurrence of those several parts to demonstrate the elegant proportion of the whole."[d]

Mr. Paley uses the word in a more confined and, perhaps, a more proper sense, when applied to Great Britain; as meaning that part of the law, which relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office, and jurisdiction of the courts of justice.[e] In this sense I shall use the term, when I speak of the British constitution. And, in this sense, the superiority of our constitution to that of Great Britain will eminently appear from the comparison, which we now institute, between their principles, their construction, their proportion, and their properties.

The extension of the theory and practice of representation through all the different departments of the state is another very important acquisition made, by the Americans, in the science of jurisprudence and government. To the ancients, this theory and practice seem to have been altogether unknown. To this moment, the representation of the people is not the sole principle of any government in Europe. Great Britain boasts, and she may boast with justice, that, by the admission of representation, she has introduced a valuable improvement into the science of jurisprudence. The improvement is certainly valuable, so far as it extends; but it is by no means sufficiently extensive.

Is the principle of representation introduced into the executive department of the constitution of Great Britain?

[d] 4. Bl. Com. 435, 436. [e] 3. Paley. 203.

This has never been attempted. Before the revolution of one thousand six hundred and eighty eight, some of the kings claimed to hold their thrones by divine, others by hereditary right; and even at the important era of that revolution, nothing farther was endeavoured or obtained, than the recognition of certain parts of an original contract, supposed, at some former period, to have been made between the king and the people. A contract seems to exclude, rather than to imply delegated power. The judges of Great Britain are appointed by the crown. The judicial department, therefore, does not depend upon a representation of the people, even in its remotest degree. Is representation a principle operating in the legislative department of Great Britain? It is; but it is not a predominating principle; though it may serve as a very salutary check. The legislature consists of three branches, the king, the lords, and the commons. Of these, only the latter are supposed, by the constitution, to represent the authority of the people. We now see clearly, to what a narrow corner of the British government the principle of representation is confined. In no other government in Europe does it extend farther: in none, I believe, so far. The American States enjoy the glory and the happiness of diffusing this vital principle throughout all the different divisions and departments of the government. Representation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of publick affairs. This chain may consist of one link, or of more links than one; but it should always be sufficiently strong and discernible.

As, in England, the house of commons alone represents, or is supposed to represent, the people at large;

so, in that house alone are we to look for the constitutional and authoritative expression of the people's will. But even in that house, this will is but very feebly and very imperfectly expressed; for the representation in that house is very unequal and inadequate; and it is protracted through a period of time much too long.

It is very unequal and inadequate. In England, we may, from information which seems to be unexceptionable, compute six hundred and thirty nine thousand taxable inhabitants. This number would assign one representative to twelve hundred constituents. But the fact is, that a number not exceeding six thousand are sufficient to return more than one half of the members of the house of commons. This is in the proportion of twenty three constituents for one representative. The consequence is, that a majority of the house of commons may be returned by less than a fiftieth part of the constituents, that ought to be requisite for returning that majority. What is the situation of the other forty nine parts? Need I repeat, this representation is very unequal and inadequate? As to the number of electors, it certainly is.

It may, perhaps, be expected, that this deficiency in their numbers is, in some measure at least, compensated by the worth, the respectability, the independence, and the enlarged influence of the individuals, who are empowered to vote. To this expectation, the fact is directly reverse. That small part are the most dependent and the least respectable part of the commons of England. They are emphatically styled the *rotten* part of the constitution. In dignity and respectability, therefore, as well as in numbers, the representation of the

commons of England is extremely inadequate and unequal.

The softness of a whisper may sometimes communicate sound with a more distinct impression than the report of a cannon. Sir William Blackstone admits that "if any alteration might be wished or suggested in the present frame of parliament, it should be in favour of a more complete representation of the people."[f]

The inequality of the representation of the people of England is evinced, in the most striking manner, by another comparative view, in which it may be placed. Ninety two members represent the landed interest; about one hundred members represent the great cities and towns; above three hundred members represent small and inconsiderable boroughs.

But further; the representation of the commons is not renewed by them at periods sufficiently near one another. Parliaments were at first annual; they were afterwards triennial; now they are septennial. This last period is surely too long. The members will be apt to forget the source from which they have received their powers. Every government, in order to preserve its freedom, has frequent need of some new provisions in favour of that freedom. Such new provisions are most likely to spring from those, who have been recently animated by the inspiration of the people.

A representation, inadequate, unequal, and continued too long, is inconsistent with the principles of free go-

[f] 1. Bl. Com. 183.

vernment: for by such a representation, it is probable that the sense of the people will be misapprehended, or misrepresented, or despised. This probability has, in England, been converted into fact and experience. During many years past, the politicks of the house of commons have been moved by the direction of the court and ministers, and not by the sense of the nation. Numerous and striking instances of this might be produced. But I can only point to those paths of investigation; I cannot pursue them.

How immensely different is the state of representation in the house of commons, from that which is established in the United States. With us, every freeman who possesses an attachment to the community, and a common interest with his fellow citizens, and is in a situation not necessarily dependent, is entitled to a vote for members. With us, no preference is given to any party, any interest, any situation, any profession, or any description over another. With us, those votes, equally, freely, and universally diffused, will have their frequent and powerful operation and influence. With us, therefore, it may be expected, that the voice of the representatives will be the faithful echo of the voice of the people.

Having seen that the house of representatives of the United States will not suffer by being compared, in its proportion and in its duration, with the house of commons of Great Britain; let us proceed to a comparison of the senate with the house of lords.

That house is divided into two orders; the lords spiritual, and the lords temporal. The lords spiritual

are composed of the archbishops and bishops. All these hold, or are supposed to hold, certain ancient baronies under the crown; and, in right of succession to those baronies, which were inalienable from their respective dignities, they obtained their seats in the house of lords. With the other lords they intermix in their votes; and the majority of such intermixture binds both estates. The lords temporal consist of all the peers of the realm, by whatever title of nobility they are distinguished. Of these, some sit by descent, as all ancient peers; others, by creation, as all new made ones; others, since the union with Scotland, by election of the nobility of that country. The number of peers is indefinite; and may be increased at the pleasure of the crown.

The writers on the British constitution view the distinctions of rank and honours as necessary in every well governed state, in order to reward such as are eminent for their services to the publick; exciting thus a laudable ardour in others; and diffusing, by such ardour, life and vigour through the whole community. A body of nobility, they say, creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince; rising, like a pyramid, from a broad foundation, and diminishing as it rises, till, at last, it terminates in a single point. It is this ascending and contracting proportion, they conclude, which adds stability to any government.

That eminent services ought to be rewarded, that devotion to the publick ought to receive the warmest encouragement, will not be denied here. But does this encouragement—do these rewards grow only in an aristocratick soil? Has republicanism no rewards or honours

for her meritorious sons? She is accused, it is true, of ingratitude. But the facts, which have given rise to the accusation, have not, we hope, been owing peculiarly to her disposition or principles, but have sprung from a spirit of envy and malevolence, predominating, alas! too much in all communities, and discovering too often more activity and zeal in doing mischief, than the opposite qualities display in doing good. Besides; instances have not been unfrequent, in which publick gratitude has been expressed by commonwealths, most generously and most effectually, both in words and actions. It is true, that the publick testimonials of gratitude and esteem have no hereditary descent among republicans; because it is true, that no regular course of descent is established in the qualities and services which merit them.

The nobility, we are told, are necessary in the British constitution, to form a barrier against the mutual encroachments of the king and of the people. In the government of the United States, separate orders of men do not exist; no encroachments of this kind can take place; and there is no occasion to provide barriers against them. The pyramid of government may certainly be raised with all the graces of fair proportion, and also with the more substantial qualities of firmness and strength, although the materials, of which it is constructed, be not an assemblage of different and dissimilar kinds. These are more likely to recal to our minds the composition and the fate of a heterogeneous and disjointed piece of workmanship, so well described by the prophet Daniel. But to drop the idea of approving and disapproving by metaphor; we find that, in Britain, there being two orders, the king and the people, it was necessary that there should

be a third, to hold the balance between them. But different orders, we apprehend, may well be dispensed with in a good and perfect government.

Wisdom, it is said, is found in an aristocracy. Why? Because its members are formed by education, and matured by experience, for the discharge of their duty. Education and experience, it will be readily allowed, are excellent for forming and finishing the habits and characters of statesmen. But on whom will the best education be probably bestowed? On whom will it be likely to produce the strongest and most beneficial influence? On him, whose parents know, and who himself will soon know, that, whether he receive it or not, or, receiving it, whether he improve it or not, still he must succeed to all the preeminences of aristocratick power?—or on him, whose parents foresee, and who himself will be soon sensible, that his prospects of success in publick life must depend on the qualities, acquired as well as natural, which he can bring into publick life along with him? Whom will experience best teach? Him, who sees, that, as estimable acquirements have not been necessary for introducing him to the dignities of the state, they are as little necessary for continuing him in the enjoyment of them? or him, who is aware, that, as the good opinion of his fellow citizens concerning his talents and virtues procured him admission to the honours of his country, his continuance in the possession of those honours must depend on his justifying that good opinion, on his improving it into confidence, and on his showing, by a progressive display of services and accomplishments, that his conduct becomes daily more and more worthy of publick sanction and esteem? He is, it is true, in some measure, dependent: but his dependence is not of an

irrational or illiberal kind. It is of a kind, which, instead of depressing, will rouse and elevate the temper and character.

We thus seize the strong outworks of aristocracy, and successfully turn on herself her most formidable batteries.

In drawing a contrast between the executive magistrates of the United States and Great Britain, I wave every degree of comparison with regard to some of the characters applied to the latter, in the description given of him by the British law and the British lawyers. They ascribe to him certain qualities as inherent in his royal capacity, distinct from and superiour to those of any other individual in the nation: they assign to him certain properties of a great and transcendent nature: by these means, it is thought, the people will consider him in the light of a superiour being; and will pay him that awful respect, which may enable him, with greater ease, to carry on the business of government. The law clothes him with the attributes of sovereignty, of ubiquity, and of absolute perfection: he can do no wrong: he can think no wrong: in him no folly—in him no weakness can be found: royal wisdom is ascribed to the infant of a span long, as much as to the experienced sire, who has seen three generations: the man dies; but the king satisfies the wish of eastern adulation: he lives for ever!

Prepossessions long entertained, habits long formed, and practices long established may, possibly, have interwoven those ideas into the system of the British constitution in such a manner, that it would be difficult now to disentangle them, without tearing or injuring some more

useful parts of the fabrick. But in forming a new system, it is certainly neither necessary nor proper to introduce into it qualities and pretensions so disproportioned to the sober consideration and management of human affairs. Power may be conferred without mystery; and may be exercised, for every wise and benevolent purpose, without challenging attributes, to which our frail and imperfect state of humanity stands in daily and marked contradiction.

On what foundation is the monarchical part of the British constitution supported? Are the rights of the monarch supposed, by it, to flow from the authority of those, over whom he is placed? Is the majesty of the people recognised as the august parent of the prerogative of the prince? No. Such principles have never received the sanction of the British constitution. Concerning the origin of the powers and rights of their monarchs, very different opinions have, at different times, been entertained and propagated. The dark foundations of conquest have, in some reigns, been uncovered and exposed to view. Divine right has, in others, been impiously summoned to sanctify claims and pretensions, too exorbitant to have derived their source from human authority. At some periods, the title to the crown has been supposed to be founded on hereditary right, a right derived, by succession, from a long list of ancestors. But, in tracing this succession upwards, we necessarily come, at last, in fact, or in idea, to some one, who was the first possessor. How did he acquire his possession? The solution, now received, of this question, is, that it was in consequence of an original contract, made, at some former distant period, between the king and the people. The terms of this contract have, indeed, been

the subject of frequent and doubtful disputation. At the revolution, however, some of them were reduced to a certainty: and the existence of the contract itself was explicitly recognised. But a contract does not imply the idea of *derivative* power; it seems rather to imply an equality between the parties contracting. Besides; the crown, on whomever it may be devolved by virtue of this contract, still retains its descendible quality, and becomes hereditary in the wearer. Even in this enlightened century, the most determined champions of liberty in Great Britain have not instituted the claim, that the power of every part of government, the monarchical not excepted, should be founded on the authority of the people. Hear in what a humiliating manner one of their boldest and most energetick writers has described their power on this interesting subject. "The British liberties are not the grants of princes. They are original rights, conditions of original contracts, coequal with the prerogative, and coeval with the government." [s]

How different is this language, and how different are these sentiments, from the language and sentiments, which, under our improved systems of government, we are entitled to hold and express! We have no occasion to enter a caveat against the supposition, that our liberties are the grants of princes. With us, the powers of magistrates, call them by whatever name you please, are the grants of the people. With us, no prerogative or government can be set up as coequal with the authority of the people. The supreme power is in them; and in them, even when a constitution is formed, and government is in operation, the supreme power still remains.

[s] Bol. Rem. let. 4.

A portion of their authority they, indeed, delegate; but they delegate that portion in whatever manner, in whatever measure, for whatever time, to whatever persons, and on whatever conditions they choose to fix.

Those, who have traced and examined the subject of the appointment of governours, find, or think they find, an irreconcilable opposition between the principles of what they admit to be sound theory, and the rules of what they contend to be exclusively the safe and eligible practice. That what appears right in theory may be wrong in practice, is, no doubt, a possible case: but I am apt to believe that, generally, this contrariety is more apparent than real: and proceeds either from inaccurate investigation, or from improper conduct.

It has been the sentiment of many writers, that to have elective governours is best in speculation; but that to have hereditary ones is best in fact. The sense of nations has often, on this subject, coincided with the sentiments of writers; and therefore, they have trusted to chance rather than to choice, the succession of those, who hold the reins of power over them. They admit, that the chance is even a bad one. They admit that one born to govern is, by education, generally disqualified, both in body and mind, rather than qualified for government. They admit, that he will probably be debased by ignorance, enervated by pleasure, intoxicated by flattery, and corrupted by pride. They admit, that this chance may give them a fool, a madman, a tyrant, or a monster: and yet they hold it safer to depend on all the caprices of this very chance, than to commit their fortune and their fate to the discernment of choice.

And whence this strong antipathy to choice? Popular clamours, popular disturbances, popular distractions, popular tumults, and popular insurrections are ever present to their view. The unfortunate and fluctuating example of Poland dances perpetually before their eyes. They reflect not on the cause of this example. Poland is composed only of slaves, headed and commanded by a few despots. Those despots have private purposes to serve; and they head their slaves as the instruments for executing those private purposes. In Poland, we search in vain for a people. Need we be surprised, that, at an election in Poland, where there are only tyrants and slaves, all the detestable and pernicious extremes of tyranny and slavery should unite?

But surely, in the United States, we have no occasion to be apprehensive of such an odious and destructive union. In the United States, we have freemen and fellow citizens. To freemen and fellow citizens, and to those selected, for this very purpose, by freemen and fellow citizens, we may trust the appointment of our first and most important magistrate. In this appointment, no one can participate, either immediately or indirectly, who does not possess a common interest with the community. We are justified, therefore, in abandoning chance, and confiding in choice: our practice corresponds with our theory; and our theory is admitted to be just. An election made by those, whom we have described, authorized by the constitution, directed by the laws, held on the same day and for the same purpose, but at different and at distant places—such an election may certainly be carried on with fairness and with regularity; and its event may be considered as the

genuine production of design, and not as the casual result of a "lottery."[h]

In one important particular—the unity of the executive power—the constitution of the United States stands on an equal footing with that of Great Britain. In one respect, the provision is much more efficacious.

The British throne is surrounded by counsellors. With regard to their authority, a profound and mysterious silence is observed. One effect, we know, they produce; and we conceive it to be a very pernicious one. Between power and responsibility, they interpose an impenetrable barrier. Who possesses the executive power? The king. When its baneful emanations fly over the land; who are responsible for the mischief? His ministers. Amidst their multitude, and the secrecy, with which business, especially that of a perilous kind, is transacted, it will be often difficult to select the culprits; still more so, to punish them. The criminality will be diffused and blended with so much variety and intricacy, that it will be almost impossible to ascertain to how many it extends, and what particular share should be assigned to each.

But let us trace this subject a little further. Though the power of the king's counsellors is not, as far as I can discover, defined or described in the British constitution; yet their seats are certainly provided for some purpose, and filled with some effect. What is wanting in authority may be supplied by intrigue; and, in the place of constitutional influence, may be substituted that sub-

[h] See Bol. Pat. King. 89.

the ascendency, which is acquired and preserved by deeply dissembled obsequiousness. To so many arts, secret, unceasing, and well directed, can we suppose that a prince, in whose disposition is found any thing weak, indolent, or accommodating, will not be frequently induced to yield? Hence spring the evils of a partial, an indecisive, and a disjointed administration.

In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people. The tenure of his office, it is true, is not hereditary; nor is it for life: but still it is a tenure of the noblest kind: by being the man of the people, he is invested; by continuing to be the man of the people, his investiture will be voluntarily, and cheerfully, and honourably renewed.

The president of the United States has such powers as are strictly and properly executive; and, by his qualified negative on the legislature, is furnished with a guard to protect his powers against their encroachments. Such powers and such a guard he ought to possess: but a just distribution of the powers of government requires that he should possess no more. In this important aspect, the constitution of the United States has much more regular, more correct, and better proportioned features, than are those of the constitution of Great Britain. It will be well worth while to trace this observation

through various instances: its truth and its interesting consequences will, by this means, clearly appear.

As the king is the sole fountain of honour; he has, without limitation, the constitutional prerogative of creating peers; and of exalting to higher dignities those already created. He has also the power of appointing and promoting the bishops and archbishops. Those lords spiritual and temporal form one branch of the legislature. The number, therefore, and the rank of the members composing that branch depend entirely on the pleasure of the crown. This is a reprehensible dependency of the legislative on the executive power. Indeed, experience has proved it to be so. A single century has not yet revolved, since twelve peers were created at one time, with the avowed purpose of securing, by their necessary votes, the success of a favourite court system. A conviction, that, on any great crown emergency, recourse can be had to a similar expedient, will naturally lead the house of lords to be cautious, in an undue degree, of giving pointed opposition to the crown, however just or well grounded such opposition might be.

Another instance of the dependency of the house of lords on the king deserves to be mentioned: the speaker of that house, whose office it is to preside there and manage the forms of their business, is the lord chancellor, whose appointment and commission are at the pleasure of the crown.

Indeed, this undue and dangerous dependency of the house of lords seems to be acknowledged and dreaded—for, in one instance, provision is made against its effects

—by the British constitution itself. It is the indisputable right of the house of commons—a right, over which they have constantly watched with a jealous solicitude—that all grants of parliamentary aid begin in their house. Several reasons have been assigned for this exclusive privilege: but the true one, arising from the spirit of the constitution, is this. The lords, being created, at pleasure, by the king, are supposed more liable to be influenced by the crown; and, being a permanent hereditary body, are, when once influenced, supposed more likely to continue so, than the commons, who are a temporary body elected by the people. It would, therefore, be extremely dangerous to give the lords any power of framing new taxes for the subject: it suffices that they have the power of rejecting, if they think the commons too lavish or improvident in their grants.

By the constitution of the United States, money bills originate in the house of representatives: the reason is, that as that house are more numerous than the other, and its members are elected more frequently; the most local and recent information of the circumstances of the people may be found there. But, as the senate derive their authority ultimately from the same origin with the other house; they have a right to propose and concur in amendments in these as well as in other bills.

But further; the power of conferring nobility is a source of influence, which the crown possesses over the house of commons, as well as over the house of lords. A coronet, and all the proud preeminences and gilded glories which encircle a coronet, are objects of ambition, whose tempting charms, few—very few indeed—are

capable of resisting. Even the great commoner wishes and sighs to be something more. Will not his views be directed to that power, by which alone his wishes can be gratified? Will not his conduct receive a bias from the longing, expecting turn of his mind? When his towering hopes of elevation are suspended on the crown; will he easily run the risk of seeing them dashed to the ground, by speaking, and voting, and acting in opposition to its views and measures?

We are now arrived, in our progress, at another fountain, from which, in Great Britain, the waters of bitterness have plentifully flowed—I mean the fountain of office. We reprehend not the nature of this power, nor the place, where, by the British constitution, it is deposited. In every government there must be such a power; and it is proper, that it should be lodged in the hands of him, who is placed at the head of the executive department. What we censure is, that this power is not circumscribed by the necessary limitations. It may be—it is exercised in favour of the members of both houses of parliament. Offices of trust and profit are scattered, with a lavish hand, among those, by whom a return, very dangerous to the liberties of the nation, may be made; and from whom such a return is but too often expected.

This is the box of Pandora, which has been opened on Britain. To its poisonous emanations have been owing the contaminated and contaminating scenes of venality, of prostitution, and corruption, which have crowded and disgraced her political theatre. To the same efficacy have been owing the indiscriminate profligacy and universal degeneracy, which have been diffu-

sed through every channel, into which the treasures of the publick have procured admission. In the house of lords, this stream of influence may flow without measure and without end. Some attempts have been made to confine it in the house of commons; but they have been feeble and unavailing. If any member of that house accepts an office under the crown, his seat, it is true, is vacated; but he may be immediately reelected. This provision, flimsy as it is, extends not to officers in the army or navy accepting new commissions. The ardent aspirations after military preferment are thus left to be exerted, with all their energetick vigour, in promoting the designs of the crown, or of the ministers of the crown.

But fears, as well as hopes, operate in favour of the influence, which we have been tracing in so many directions. For the members hold their offices and commissions, and, consequently, may be dismissed from them, at the pleasure of the crown.

Indeed, this influence has been so great and so uniform, that for more than a century past, it has been found, that reliance could be placed on it implicitly. Accordingly, during that whole period, the king has never once been under the disagreeable necessity of interposing his negative to prevent the passing of an obnoxious law. It has been discovered to be a less ungracious, though not a less efficacious method, to stop its progress in one of the two houses of parliament.

To the power of the crown to confer offices on members of parliament, we may also ascribe those numerous and violent dissensions, which, on so many occasions,

and some of them very critical ones, have convulsed the national councils, and sacrificed the national interests. Ample though the means are, which the crown can employ in gaining and securing members, by the offices in its gift, they are insufficient to gratify all. To a safe majority, the object must be confined. But of a majority, gained by the interest of the court, the necessary consequence is, a minority in opposition to its measures.[i]

The above is a plain and simple account of the manner, in which the parties in parliament have been formed, and in which they have, without interruption, been continued; though, on both sides, a very different account has been uniformly attempted to be palmed upon the publick. Neither side has chosen to give a true history and character either of themselves or of their antagonists: each finds its interest in appearing, and in representing the other, under a borrowed dress. While the influence of the crown, produced by offices of trust and profit bestowed upon members of parliament, shall continue, this state of formed and irreconcilable parties will continue also.

The result is, that a provision, by which the members of the legislature will be precluded, while they remain such, from offices, finds, with great propriety, a place in the constitution of the United States. In this important particular, it has a decided superiority over the constitution of Great Britain.

Perhaps the qualified negative of the president of the United States on the proceedings of the senate and

[i] It was the saying of King William, that if he had places enough to give, the names of whig and tory would soon be lost.

house of representatives in congress, possesses advantages over an absolute negative, such as that vested in the crown of Great Britain over the proceedings of the lords and commons. To this last, recourse would not be had, unless on occasions of the greatest emergency. A determination not to interpose it without the last necessity, would prevent the exercise of it in many instances, in which it would be proper and salutary. In this manner, it would remain, like a sword always in the scabbard, an instrument, sometimes of distant apprehension, but not of present or practical utility. The exercise of the qualified negative is not an experiment of either dangerous or doubtful issue. A small bias it turns without noise or difficulty. To the operation of a powerful bias, which cannot be safely checked or diverted, it decently and leisurely gives way.

The qualified negative will be highly advantageous in another point of view: it will form an index, by which, from time to time, the strength and height of the current of publick opinions and publick movements may, with considerable exactness, be ascertained. Whenever it is exercised, the votes of all the members of both the houses must be entered on their journals. The single point, that there is a majority, will not be the only one, which will appear: it will be evinced also, how great that majority is. If it consists of less than two thirds of both houses, it seems reasonable, that the dissent of the executive department should suspend a business, which is already so nearly in equilibrio. On the other hand, if, after all the discussion, investigation, and consideration, which must have been employed upon a bill in its different stages, before its presentment to the president of the United States, and after its return from him with his

objections to it, two thirds of each house are still of sentiment, that it ought to be passed into a law; this would be an evidence, that the current of publick opinion in its favour is so strong, that it ought not to be opposed. The experiment, though doubtful, ought to be made, when it is called for so long and so loudly.

Besides; the objections of the president, even when unsuccessful, will not be without their use. If the law, notwithstanding all the unfavourable appearances, which accurate political disquisition discovered against it, proves, upon trial, to be beneficial in practice; it will add one to the many instances, in which feeling may be trusted more than argument. If, on the contrary, experience shows the law to be replete with all the inconveniences, which sagacious scrutiny foresaw in its operations, the disease will no sooner appear, than the remedy will be known and applied.

Another advantage, of very general and extensive import, will flow from the qualified negative possessed by the president of the United States. His observations upon the bills and acts of the legislature will, in a series of time, gradually furnish the most valuable and the best adapted materials for composing a practical system of legislation. In every successive period, experience and reasoning will go hand in hand; and will, jointly, produce a collection of accurate and satisfactory knowledge, which could be the separate result of neither.

By the British constitution, the power of judging in the last resort is placed in the house of lords. It is allowed, by an English writer on that constitution, that there is nothing in the formation of the house of lords;

nor in the education, habits, character, or professions of the members who compose it; nor in the mode of their appointment, or the right, by which they succeed to their places in it, that suggests any intelligible fitness in the nature of this regulation.[1] Ecclesiasticks, courtiers, naval and military officers, young men, just of age, born to their elevated station, in other words, placed there by chance, are, for the most part, the members, who compose this important and supreme tribunal. These are the men, authorized and assigned to revise and correct the decisions, pronounced by the sages of the law, who have been raised to the seat of justice on account of their professional eminence, and have employed their lives in the study and practice of the jurisprudence of their country. There is surely something, which, at least in theory, appears very incongruous in this establishment of things. The practical consequences of its impropriety are, in a considerable degree, avoided, by placing in the house of lords some of the greatest law characters in the kingdom; by calling to their assistance the opinions of the judges upon legal questions, which come before the house for its final determination; and by the great deference which those, who are uninformed, naturally pay to those, who are distinguished by their information. After all, however, there is a very improper mixture of legislative and judicial authority vested and blended in the same assembly. This is entirely avoided in the constitution of the United States.

It may, perhaps, be objected, that, by this constitution, one branch of the legislature is to present, and the other is to try impeachments. The answer is obvious.

[1] 2. Paley. 282. 283.

Impeachments, and offences and offenders impeachable, come not, in those descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law.

In the judicial establishments of Great Britain, there is, we cheerfully confess, much to admire, and much to imitate. The judges are the grand depository of the fundamental laws of the kingdom; and have gained a known and stated jurisdiction, regulated by certain and established rules, which cannot be altered, but by act of parliament. By the statute 13. W. III. c. 2. "An act for the further limitation of the crown, and better securing the rights and liberties of the subject," provision is made, that after the said limitation shall take effect, the commissions of the judges shall be, not, as formerly, "*durante* bene placito," but "quamdiu bene se gesserint;" that their salaries shall be ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament.

Though, in virtue of this law, the judges received commissions to hold their offices during their good behaviour; it was supposed, that their seats were immediately vacated by the demise of the crown. When their seats were vacated, their salaries terminated. A new commission, it is true, might be given, and, if given, must be given during good behaviour; but a new commission might also be refused, by the successour to the throne. Under the new commission, if given, a different salary

might be assigned. In this state of dependence, not so degrading, indeed, as it had been, but still very precarious, and, as it respected the heir apparent of the throne, very embarrassing and humiliating, the judges of England continued till the first year of the reign of George the third.

That Prince, soon after his accession, declared, from the throne, to both houses of parliament, that he looked upon the independency and uprightness of judges as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of the subjects, and as most conducive to the honour of his crown. He, therefore, recommended it to the consideration of parliament, to make further provision for continuing the judges in the enjoyment of their offices during their good behaviour, notwithstanding the demise of the crown; and for enabling him to secure their salaries during the continuance of their commissions. Provision was accordingly made, by parliament, for both those purposes. But the judges are still liable to be removed by the king, upon the address of both houses of parliament.

This establishment for the administration of justice appears, in the opinion of Mr. Paley, no undiscerning judge of the subject, to approach so near to perfection, as to justify him in declaring, that a politician, who should sit down to delineate a plan for the dispensation of publick justice, guarded against all access to influence and corruption, and bringing together the separate advantages of knowledge and impartiality, would find, when he had done, that he had been transcribing the judicial

constitution of England.[k] "It may teach," continues he, "the most discontented among us to acquiesce in the government of his country, to reflect that the pure, wise, and equal administration of the laws forms the first end and blessing of social union; and that this blessing is enjoyed by him in a perfection, which he will seek in vain in any other nation of the world."

Notwithstanding this high encomium, pronounced from a motive of which I cannot but approve, I hesitate not to institute a comparison between the judicial establishment of England, and that which is introduced by the constitution of the United States. Nay, I am sanguine, that, on a just comparison, the latter will be found to contain many very useful and valuable improvements on the former.

The laws, in England, respecting the independency of the judges, have been construed as confined to those in the superiour courts.[l] In the United States, this independency extends to judges in courts inferiour as well as supreme. This independency reaches equally their salaries and their commissions.

In England, the judges of the superiour courts do not now, as they did formerly, hold their commissions and their salaries at the pleasure of the crown; but they still hold them at the pleasure of the parliament: the judicial subsists, and may be blown to annihilation, by the breath of the legislative department. In the United States, the judges stand upon the sure basis of the constitution: the judicial department is independent of the

[k] 2. Paley. 284. 285. [l] 1. Bl. Com. 267.

department of legislature. No act of congress can shake their commissions or reduce their salaries. "The judges, both of the supreme and inferiour courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."[m] It is not lawful for the president of the United States to remove them on the address of the two houses of congress. They may be removed, however, as they ought to be, on conviction of high crimes and misdemeanors.

The judges of the United States stand on a much more independent footing than that on which the judges of England stand, with regard to jurisdiction, as well as with regard to commissions and salaries. In many cases, the jurisdiction of the judges of the United States is ascertained and secured by the constitution: as to these, the power of the judicial is coordinate with that of the legislative department. As to the other cases, by the necessary result of the constitution, the authority of the former is paramount to the authority of the latter.

It will be proper to illustrate, at some length, the nature and consequences of these important doctrines concerning the judicial department of the United States; and, at the same time, to contrast them with the doctrines held concerning the same department in England. Much useful and practical information may be drawn from this comparative review.

It is entertaining, and it may be very instructive, to trace and examine the opinions of the English courts

[m] Con. U. S. art. 3. s. 1.

and lawyers concerning the decision, which may be given, in the judicial department, upon the validity or invalidity of acts of parliament.

In some books we are told plainly, and without any circumlocution or disguise—that an act of parliament against law and reason is, therefore, void[n]— that, in many cases, the common law will control acts of parliament; and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed; the common law will control it, and adjudge such act to be void. Some statutes are made against law and right, which those who made them perceiving, would not put them in execution[o]— that an act of parliament made against natural equity, as to make a man judge in his own cause, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.[p]

My Lord Chief Justice Holt expresses himself, upon this delicate and embarrassing subject, in his usual blunt and decided manner: "It is a very reasonable and true saying, that if an act of parliament should ordain, that the same person should be a party and a judge, or, which is the same thing, judge in his own cause; it would be a void act of parliament; for it is impossible that one should be judge and party; for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong; though it may do several things, that look pretty odd."[q]

[n] 4. Rep. 13.

[o] 8. Rep. 118.

[p] Hob. 87.

[q] 12. Mod. 687. 698.

These doctrines and sayings, however reasonable and true they appear to be, have been, nevertheless, deemed too bold; for they are irreconcilable with the lately introduced positions concerning the supreme, absolute, and uncontrollable power of the British parliament. Accordingly, Sir William Blackstone, on the principles of his system, expresses himself in the following manner, remarkably guarded and circumspect, as to the extent of the parliamentary power. "If there arise *out* of acts of parliament, *collaterally*, any absurd consequences, *manifestly* contradictory to common reason; they are, with regard to *those collateral* consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely—that acts of parliament contrary to reason are void. But if the parliament will *positively* enact a thing to be done, which is unreasonable; I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the *main object* of a statute is unreasonable, the judges are at liberty to reject it: for that were to set the judicial power above that of the legislature, which would be subversive of all government." "No court has power to defeat the intent of the legislature, when couched in such evident and express words, as to leave no doubt concerning its intention."[r]

The successour of Sir William Blackstone in the Vinerian chair walks in his footsteps. "It is certain," he admits, "no human authority can rightfully infringe or abrogate the smallest particle of natural or divine law; yet a British judge, of highly deserved estimation,

[r] 1. Bl. Com. 91.

seems in some measure unguarded in asserting from the bench, that an act of parliament made against natural equity, is void in itself. The principle is infallibly true; the application of it, and the conclusion, dangerous. We must distinguish between right and power; between moral fitness and political authority. We cannot expect that all acts of legislators will be ethically perfect; but if their proceedings are to be decided upon by their subjects, government and subordination cease."*

It is very true—we ought to "distinguish between right and power:" but I always apprehended, that the true use of this distinction was, to show, that power, in opposition to right, was devested of every title, not that it was clothed with the strongest title, to obedience. Is it really true, that if "the parliament will positively enact an unreasonable thing—a thing manifestly contradictory to common reason—there is no power that can control it?" Is it really true that such a power, vested in the judicial department, would set it above the legislature, and would be subversive of all government? If all this is true; what will the miserable, but unavoidable consequence be? Is it possible, in the nature of things, that all which is positively enacted by parliament can be decreed and enforced by the courts of justice? It will not be pretended. The words in two different laws may be clearly repugnant to one another. The law supposes that, sometimes, this is the case; and accordingly has provided, as we are told in the Commentaries, that, in this case, the later law takes place of the elder. "Leges posteriores, priores contrarias abrogant," we are told, and properly told, is a maxim of universal law, as well

* El. Jur. (4to.) 48.

as of the English constitutions.[t] Suppose two such repugnant laws to be produced in the same cause, before the same court: what must it do? It must control one, or obey neither. In this last instance, the remedy would be worse than the disease: but there is not the least occasion to have recourse to this desperate remedy. The rule which we have cited from the Commentaries, shows the method that should be followed. In the case supposed, the first law is repealed by the second: the second, therefore, is the only existing law.

Two contradictory laws, we have seen, may flow from the same source: and we have also seen, what, in that case, is to be done. But two contradictory laws may flow likewise from different sources, one superiour to the other: what is to be done in this case?

We are informed, in another part of the Commentaries, that, "on the two foundations of the law of nature, and the law of revelation, all human laws depend; that is to say, no human laws should be suffered to contradict these"—"that, if any human law should enjoin us to commit what is prohibited by these, we are bound to transgress that human law, or else we must offend both the natural and the divine."[u] What! are we bound to transgress it?—And are the courts of justice forbidden to reject it? Surely these positions are inconsistent and irreconcilable.

But to avoid the contradiction, shall it be said, that we are bound to suppose every thing, positively and plainly enacted by the legislature, to be, at least, not repugnant

[t] 1. Bl. Com. 59. [u] Id. 42. 43.

to natural or revealed law? This may lead us out of intricate mazes respecting the omnipotence; but, I am afraid, it will lead us into mazes equally intricate and more dangerous concerning the infallibility of parliament. This tenet in the political creed will be found as heterodox as the other.

"I know of no power," says Sir William Blackstone, "which can control the parliament." His meaning is obviously, that he knew no *human* power sufficient for this purpose. But the parliament may, unquestionably, be controlled by natural or revealed law, proceeding from *divine* authority. Is not this authority superiour to any thing that can be enacted by parliament? Is not this superiour authority binding upon the courts of justice? When repugnant commands are delivered by two different authorities, one inferiour and the other superiour; which must be obeyed? When the courts of justice obey the superiour authority, it cannot be said with propriety that they control the inferiour one; they only declare, as it is their duty to declare, that this inferiour one is controlled by the other, which is superiour. They do not repeal the act of parliament: they pronounce it void, because contrary to an overruling law. From that overruling law, they receive the authority to pronounce such a sentence. In this derivative view, their sentence is of obligation paramount to the act of the inferiour legislative power.

In the United States, the legislative authority is subjected to another control, beside that arising from natural and revealed law; it is subjected to the control arising from the constitution. From the constitution, the legislative department, as well as every other part of

government, derives its power: by the constitution, the legislative, as well as every other department, must be directed; of the constitution, no alteration by the legislature can be made or authorized. In our system of jurisprudence, these positions appear to be incontrovertible. The constitution is the supreme law of the land: to that supreme law every other power must be inferiour and subordinate.

Now, let us suppose, that the legislature should pass an act, manifestly repugnant to some part of the constitution; and that the operation and validity of both should come regularly in question before a court, forming a portion of the judicial department. In that department, the "judicial power of the United States is vested" by the "people," who "ordained and established" the constitution. The business and the design of the judicial power is, to administer justice according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must, of necessity, give place to the other. Both, according to our supposition, come regularly before the court, for its decision on their operation and validity. It is the right and it is the duty of the court to decide upon them: its decision must be made, for justice must be administered according to the law of the land. When the question occurs—What is the law of the land? it must also decide this question. In what manner is this question to be decided? The answer seems to be a very easy one. The supreme power of the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void, and has no opera-

tion. In this manner it is the right and it is the duty of a court of justice, under the constitution of the United States, to decide.

This is the necessary result of the distribution of power, made, by the constitution, between the legislative and the judicial departments. The same constitution is the supreme law to both. If that constitution be infringed by one, it is no reason that the infringement should be abetted, though it is a strong reason that it should be discountenanced and declared void by the other.

The effects of this salutary regulation, necessarily resulting from the constitution, are great and illustrious. In consequence of it, the bounds of the legislative power—a power the most apt to overleap its bounds—are not only distinctly marked in the system itself; but effectual and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless. What a noble guard against legislative despotism!

This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superiour, in its general nature, to that of the legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superiour power of the constitution—the supreme law of the land.

This regulation, when considered properly, is viewed in a favourable light by the legislature itself. "It has

been objected," said a learned member[v] of the house of representatives, in a late debate, "that, by adopting the bill before us, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness. I am so far from controverting this right in the judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect, that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government, which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the constitution, that there is a remedy for the failures even of the legislature itself."

It has already appeared, that the laws, in England, respecting the independency of the judges, have been construed as confined to those in the superiour courts. In many courts, nay in almost all the courts, which have jurisdiction in criminal, even in capital cases, the judges are still appointed and commissioned occasionally, and at the pleasure of the crown. Those courts, though possessing only a local jurisdiction, and confined to particular districts, are yet of a general nature, and are universally diffused over the kingdom. Such are the courts of oyer and terminer and general gaol delivery. They are held twice in every year in every county of the kingdom, except the four northern ones, in which they

[v] Mr. Elias Boudinot.

are held only once, and London and Middlesex, in which they are held eight times. By their commissions, the judges of those courts have authority to hear and determine all treasons, felonies, and misdemeanors; and to try and deliver every prisoner who shall be in the gaol, when they arrive at the circuit town, whenever indicted, or for whatever crime committed. Sometimes also, upon particular emergencies, the king issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment. Those courts are held before the king's commissioners, among whom are usually—but not necessarily, as it would seem—two judges of the courts at Westminster.*

It is somewhat surprising, that, in a nation where the value of liberty and personal security has been so long and so well known, less care has been taken to provide for the independency of the judges in criminal than in civil jurisdiction. Is property of more consequence than life or personal liberty? Is it more likely to become the selected and devoted object of ministerial vengeance or resentment? If peculiar precaution was necessary or proper to ensure the independence of the judges on the crown, one would think it most reasonable to apply that precaution to the independence of those judges, who exercise criminal jurisdiction. Even treason may be tried before judges, named, for the occasion, and during pleasure, by him, who, in law, is supposed to be personally as well as politically offended.

To the constitution of the United States, and to those who enjoy the advantages of that constitution, no judges

* 4. Bl. Com. 266. 267.

are known, but such as hold their offices during good behaviour.

With regard to the institution and establishment of juries, as well as those of judges, an advantage is possessed under the constitution of the United States, greater than what is possessed under the constitution of Great Britain. This subject deserves to be placed in the clearest and strongest point of view.

To be tried only by men of one's own condition, is one of the greatest blessings—to know that one can be tried only by such men, is one of the greatest securities—which can be enjoyed under any government.

If the trial of causes was committed entirely to one selected body of men, deprived, by their situation, of having many opportunities of knowing particularly the circumstances and characters of the parties, who come before them; it could not be expected, that the proper and practical adjustment of facts to persons would, in every instance, be made. The transactions of life will be best investigated by a competent number of sensible and unprejudiced jurymen, summoned and assembled for each particular cause. Such men will be triers not only of the facts; but also of the credibility of the witnesses. They will know whom and what to believe, as well as whom and what to hear. Truth will be estimated by the character, and not by the number, of those, who give their testimony. The testimony of one witness will not be rejected merely because it stands single; nor will the testimony of two witnesses be believed, if it be encountered by reason and probability. These advantages of a

trial by jury are important in all causes: in criminal causes, they are of peculiar importance.

In criminal causes, the accusation charges not only the particular fact, which has been committed, but also the motive or design, to which it owed its origin, and from which it receives its complexion. This design is often so closely interwoven with the transaction, that the elucidation of both depends on a collected view of particulars, arising not merely from the testimony, but also from the conduct and character of the witnesses, and sometimes likewise from the character and conduct of the person accused. Of such conduct and character, men of the same condition with that person, and probably of the same condition with the witnesses too, are the best qualified to make the proper comparison and estimate; and consequently to determine, upon the whole, whether the conduct of the prisoner, comprehending both the fact and the motives, is, or is not, within the meaning of the law, upon which the accusation against him is founded.

This institution does honour to human policy: it is the most excellent method for the investigation and discovery of truth; and the best guardian of both publick and private liberty, which has been hitherto devised by the ingenuity of man. We are told by the celebrated Montesquieu, that Rome, that Sparta, that Carthage—states, once so free and so prosperous—have lost their liberties, and have perished. Their fate he holds up to the view of other states, as a memento of their own. But there is one consolatory distinction, which he did not take, and which we will apply in our favour. In Rome, in Sparta, in Carthage, the trial by jury did not exist, or

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